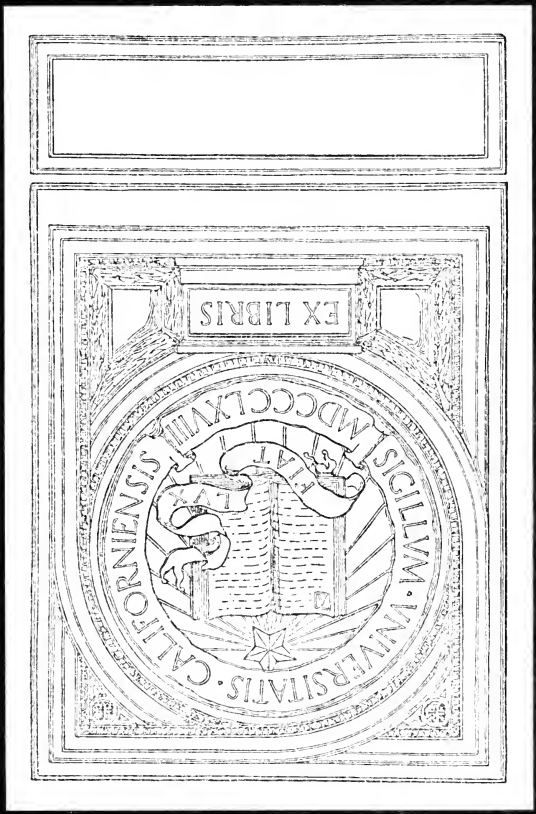

ARGUMENT

IN FAVOR OF

THE CONSTITUTIONALITY

OF THE

GENERAL BANKING LAW,

WITH

AN APPENDIX.

AN

ARGUMENT,

IN FAVOR OF

THE CONSTITUTIONALITY

OF THE

GENERAL BANKING LAW

OF THIS STATE,

DELIVERED BEFORE THE SUPREME COURT, AT THE JULY TERM, 1839.

BY SAMUEL A. FOOT,
Of the city of New-York, Counsellor at Law.

GENEVA:
IRA MERRELL, PRINTER, SENECA-STREET.
1839.

ADVERTISEMENT.

The history of judicial controversy, so far as my knowledge of it extends, does not furnish a case, in which such an immense amount of property and such vital interests of the community were involved, as were brought into discussion and subjected to judicial determination, by the argument of the cause of Anson Thomas, President of the Bank of Central New-York, against Samuel D. Dakin, at the last July Term of the Supreme Court of this State, held at the city of Utica. The question raised, discussed and submitted to the Court, in that cause, was, whether the Act of our Legislature, entitled, "An Act to authorize the business of banking," passed the 18th April, 1838, and commonly called the "General Banking Law," was constitutional or not. If it is not constitutional, it is of course void, and gives the banking companies, formed under it, no legal authority to conduct banking business. Every one will readily see, the immeasurable amount of unmixed evil which must flow from such a result. The contemplation of it, even, is appalling. It became my duty to take a responsible part in this grave discussion.

The tens of millions which have already been invested under this Statute, and now actively employed, and the arrangements which have been made for the investment of hundreds of millions, give the subject an unparalleled importance as regards mere amount of property. The peculiar moment too, at which the question arises, is most inauspicious for the business and commerce of the country, and the public credit of the States of our Union. The determination of the question will, moreover, have a material influence on the future legislation of this State, so far as relates to private incorporations; and, it is hoped, may have a beneficial effect upon it, and check, if not entirely cure, many serious evils we now endure.

These various aspects of the subject have created great anxiety in the public mind, as I learn, to be informed of the grounds taken in the argument, the precise questions raised and discussed, and the views taken and suggestions made by the Court.

The passing of the present month at this place gives me an opportunity, and I have concluded to write out and publish my argument, in the hope, that its publication may be of some benefit, at least, in allaying the anxiety felt to be informed of what occurred on the discussion, and perhaps, in exhibiting the firm grounds on which the rights of those rest, who have invested their property on the faith of a public statute of our state.

SAMUEL A. FOOT.

GENEVA, August 1, 1839.

HEADS OF THE ARGUMENT.

STATEMENT of the case—and how the question arises, respecting the constitutionality of the General Banking Law.

Preliminary remarks.

Propositions maintained in the argument:

First. The associations authorized by the Statute and organized under it, are not *corporations*; and, consequently, the clause in the Constitution of this State, which restricts the power of the Legislature in creating bodies corporate, does not apply to it.

Second. But admitting that the *associations* are *corporations*; still, this Statute is constitutional; because, the restrictive clause of the Constitution does not prohibit the Legislature from passing a law, authorizing an indefinite and unlimited number of corporations; or, in other words, does not apply to a general act of incorporation; and, consequently, the Legislature may now provide, by a general law, for the incorporation of an unlimited number of voluntary associations; as it could and did, in many instances, before the adoption of the present Constitution.

Third. Admitting that the constitutional restriction does apply to a general act of incorporation; nevertheless, such an act may be passed by a two-thirds vote; and the Statute in question, having passed through the regular forms of authentication, and appearing on the statute book, must be presumed to have been passed by the requisite constitutional vote.

Supreme Court.

ANSON THOMAS, President of the Bank of Central New-York,
vs.
SAMUEL D. DAKIN.*

THIS is an action of Assumpsit, commenced by declaration in the usual form, upon three drafts, amounting together to about five thousand dollars, drawn by Dakin, the defendant, in the

* This cause was argued at Utica, before the Supreme Court, on the 22d, 23d and 24th days of July, 1839, by Ward Hunt, Esq., for the defendant, and by C. P. Kirkland, Esq., and the writer of these pages, for the plaintiff. Mr. Hunt made a full and strong argument. Having evidently studied the cause thoroughly, he presented his propositions and sustained them with propriety, clearness and force.

Mr. Kirkland opened the argument for the plaintiff, in a speech of upwards of three hours in length; and during the whole of its delivery, he had the undivided attention of the Court and audience. He appeared to realize the very great importance of the question under discussion, and fully met it. His reasoning was forcible and conclusive, and his manner, as usual, remarkably appropriate.

I hope I may be indulged the remark, that the Bar of this State is in no great danger of declining in usefulness or public estimation, while gentlemen like Mr. Kirkland are rising into its first ranks.

months of February and March last, and of which the Bank of Central New York became the owner and holder, by regular indorsement, and which, being dishonored, were regularly protested for non-payment. The defendant having neglected to pay them, this suit was instituted by the plaintiff, the President of that Bank, to enforce their collection—and a demurrer to the declaration has been interposed. On this state of the pleadings, a question is raised respecting the constitutionality of the Statute, entitled, "An act to authorize the business of banking;" passed April 18, 1838, and usually called the "General Banking Law;" and under which the Association of which the plaintiff is president, was organized as a Banking Company.

The defendant's Counsel contends, that the Statute is unconstitutional, because the associations which it authorizes, and which are, or may be organized under it, are *corporations;* and as the Statute provides for the creation of an indefinite number of them, it is in violation of the *ninth section* of the *seventh artiticle* of the Constitution of this State; which is in these words: "The assent of two-thirds of the members elected to each branch "of the legislature, shall be requisite to every bill appropriating "the public monies or property, for local or private purposes, "or creating, continuing, altering, or renewing any body politic "or corporate."

Preliminary remarks. It is a source of deep regret, that the defendant, either to delay or defeat the collection of what appears to be a just demand, should, at this inauspicious moment, in the progress of our Country, its commerce and business, attempt to raise a doubt of the validity of a law, which, thus far, has produced a most benign and beneficial influence and effect, upon our embarrassed affairs and depressed community. Numerous banking institutions have been established under it, which are now in successful operation; and especially, in our commercial metropolis, several have been

organized with large and increasing capitals, furnished by domestic and foreign capitalists, relying on the faith and soundness of our institutions and laws, which are now in full and successful operation, conducted by citizens distinguished for their patriotism, moral worth and financial experience and talents. These institutions are already identified with the business of the City in which they are located; have extensive connections with the monetary affairs of our State and Country; are daily engaged in large financial transactions with the different States of our Union; and with foreign houses of wealth and credit, with whom they have already formed large and substantial arrangements, highly beneficial to our struggling commerce, which is now seeking new foreign associations, to supply the place of those destroyed by our late commercial misfortunes.

Should the defendant succeed in his defence, or even raise a serious doubt of the constitutionality of our General Banking Law, those beyond the reach and direct influence of the activity and excitement of our commercial emporium, engaged in their libraries, or taking refreshing walks in their quiet villages or fields,* can scarcely realize the extent or depth of the injury and distress produced, by destroying, or paralyzing fianancial agencies, so powerful and active, as the banks established in the city of New York under this Statute.

The bare agitation of this question must, to some extent, impair confidence, but a real doubt will fly even swifter than the wind across the Atlantic, defeat arrangements to draw foreign capital to the aid and relief of our laboring and almost exhausted Country; will prolong and increase the feverish excitement in which our monetary affairs are involved; still farther diminish and obstruct the energies of our slowly and fitfully recovering commerce and business.

* All the Justices of our Supreme Court reside in villages in the country, and the Chief Justice cultivates a farm.

If the defence prevails, a deep and almost irreparable wound will be inflicted upon our own citizens. All the banks created by our General Law will fall directly within the highly penal provisions of the Restraining Act, and all the securities held by them will, consequently, be void; and especially the bonds and mortgages taken and transferred to the Comptroller, and forming the basis and security of the most convenient and safe currency ever devised. The bills will fall valueless on a confiding and innocent community, and those least able to bear, will sustain the greatest losses. Humble, but bright hopes will be blighted; fair prospects of reasonable gains, and just rewards of virtuous industry, destroyed. The associations will be compelled to wind up their affairs; prosecutions will multiply, and litigations flood our courts. The morals of our citizens will become corrupted by holding out to them strong temptations to dishonesty. Every debtor to the associations organized under the law, who is unable or unwilling to pay his debt, will be invited, by the strong motive of interest, to delay, if not defeat his creditor. The unprincipled will take advantage of the misfortune, to increase his gains by plundering the meritorious. Confidence will be lost in the security which our laws profess to give. Mistrust will take the place of confidence, violence that of peace, and we shall be carried rapidly, by this torrent of dishonesty and crime, far towards anarchy and ruin. Facilities for business will also be materially curtailed. Those who survive the shock will be discouraged. Enterprize, and active talent will leave the State, and seek a more secure and auspicious theatre for effort.

Safety or security from our laws can no longer be hoped for, or promised. This Act was passed on the recommendation of our late Chief Magistrate, and in all its features is in exact accordance with his recommendation. It was passed by a Senate consisting of a large majority of his political friends, and by an Assembly con-

taining a like majority of his political opponents. The bill underwent a full discussion in each House, was passed by a large majority in each, and received the cheerful approbation of the Governor. It was given to the community under the highest sanctions that our institutions and public opinion could bestow. It commanded and received the wary confidence of the wealthy capitalist, as well as the freer faith of the enterprising man of business. It has gone to Europe with the recommendations of all; is highly approved by her most distinguished financial talent; has and is drawing millions of foreign capital to our shores; and, if it should now be prostrated, not only would the measure bring, in foreign judgment, great discredit on our institutions, and thus check the progress of liberal government, but it would literally destroy all confidence in our monied institutions and financial legislation; withdraw from our country, to a great extent, the foreign capital now here, and entirely prevent for years, the investment of any more. Such a catastrophe will, moreover, injure, if not seriously impair, the public credit of our State; she will lose her most powerful and willing supporters in carrying through the several large and extensive works of internal improvement which she has already, and must soon, undertake. She has already had substantial evidence of what she may expect from the banks, which have sprung up, at once, into full stature, from the ashes of the extinguished spirit of banking monopoly, which has so long oppressed all our citizens, except a favored few.*

These views are not presented with the wish or expectation, that they will deter this Court from a fearless discharge of its duty, in considering and determining upon the constitutionality of this Law, but for the purpose of awakening a profound and anxious attention to the momentous question presented for their

*The Bank of Commerce has already made large loans to the State, by accepting those offered to the public by the Canal Board.

decision, and in the hope, that they may induce the Court to form and announce their judgment at the earliest day possible, consistent with a just regard to the grave character of the subject.

My intention is to present and fairly meet every argument or suggestion, which has, or can be made against the validity of this Statute, whether insisted upon by the Counsel for the defendant, or not; with the hope, that this discussion may not only satisfy this Court of its constitutionality, but that the public mind may be composed, so far as my humble efforts can accomplish that end, by exhibiting, in a clear light, the firm basis on which the institutions rest, which have been organized under, and are protected by it.

History of the Restraining Act. We have in this State prohibited by statute for so many years, both individuals, and companies incorporated and unincorporated, not specially authorized by law, from carrying on the business of banking, and permitted it to be done only by corporations created specially for that purpose; that we have come to regard banking as a franchise, an attribute of sovereign political power, which a citizen cannot exercise, or acquire, except by legislative grant. This is a great error. The direct converse of the proposition is the truth. The States of this Union are prohibited by the Constitution of the United States from emitting bills of credit. (Con. U. S. Art. 1, Sec. 10.) Although the bills of credit, in the mind of the Convention who framed that Constitution, and intended to be prohibited, were unlike, in many material respects, bank bills of the present day, yet the Supreme Court of the United States have held, that "bills of credit" are general terms of broad import, and do embrace bank bills, issued by a State, on the faith of the State, to circulate as money; and consequently have decided, that a State has not authority to issue such bills. (Briscoe and others, vs. The President and Directors of the Bank of the Commonwealth of Kentucky, 11 Peters'

R. 257.) As issuing bills to circulate as money is the most important and valuable feature of our system of banking, this decision of the Supreme Court of the United States effectually restrains the States from engaging in it.

We commenced our restraints upon private banking in this State at an early day. On the 26th of May, 1781, Congress incorporated the "Bank of North America," and recommended to the several States of the Confederation to provide by law, "that no other bank or bankers shall be established or permitted within the said States during the war." In pursuance of this recommendation, this State passed an act on the 11th April, 1782, incorporating the "Bank of North America" within this State, and declaring, "that no other bank, public or private, shall be established within this State during the present war with Great Britain, on pain of the forfeiture of one hundred pounds for every offence by every person concerned in such bank or banks."—(1 Green, 50.) After the treaty of 1783, which secured our independence, there was no necessity for restraining banking; on the contrary, I have understood, it was difficult to induce capitalists to invest their funds in such business; and so much so, that when "The Bank of New York" was incorporated, on the 21st March, 1791, which was the first bank incorporated in this State after the war, it was difficult to obtain subscriptions for the stock, and appeals were made to the patriotism of the citizens to come forward and take it up, as a measure of public benefit. After incorparating the Bank of Albany, on the 10th of April, 1792; the Bank of Columbia at Hudson, on the 6th March, 1793; the Manhattan Company, on the 2d April, 1799; and the Farmers' Bank of Troy, on the 31st March, 1801; and pressing applications for several others having been made, the Legislature, on the 11th April, 1804, passed an act entitled, "An act to restrain unincorporated banking companies," generally denominated the "Restraining Act." (3 Web. 615, 27th Sess. ch. 117.) This

statute prohibits, under heavy penalties, all persons, associations, or companies, from banking, unless specially authorized by law. This statute has been continued to the present time and is still in force, having been strengthened and its severity increased from time to time by amendments. (2 R. S. 234; Laws of 1818, p. 242, 41st Sess. ch. 236, Sec. 1—2; 1 R. S. 712.) But for these laws, every citizen, association, copartnership or company, would have an unqualified right to commence and carry on the business of banking; and the very passage of the acts shows the existence of that right. Let it then be distinctly understood and remembered, that banking is no franchise, no attribute of sovereign power, to be granted by the Legislature to her citizens, either as individuals or members of associations; but a right that belongs to them, unless taken away by legislative enactment. Even in England, where privilege and monopoly are rife, and where the very existence of the government almost depends on sustaining the Bank of England, the business of banking is permitted to all, except in a comparatively small district around London.

Only parts of the statute assailable.

So far then as the statute under consideration operates as a mere repeal of our restraining acts, it is not only unobjectionable, but meritorious; for so far, it is a restoration of our citizens to their former rights. Those sections, or parts of the Statute only can be assailed, which confer powers on the associations which it authorises, analagous to those usually conferred on corporations.

Sections assailed.

An examination of the statute will direct us at once to those parts of it, which are supposed to confer corporate powers. They are the following:

"§ 15. Any number of persons may associate to establish offices of discount, deposite and circulation, upon the terms and conditions, and subject to the liabilities, prescribed in this act.

"§ 16. Such persons, under their hands and seals, shall make a certificate which shall specify:

"1. The name assumed to distinguish such association, and to be used in its dealings:

"5. The period at which such association shall commence and terminate.

"§ 18. Such association shall have power to carry on the business of banking, by discounting bills, notes and other evidences of debt; by receiving deposites; by buying and selling gold and silver bullion, foreign coins and bills of exchange, in the manner specified in their articles of association for the purposes authorized by this act; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business; to choose one of their number as president of such association, and to appoint a cashier, and such other officers and agents as their business may require, and to remove such president, cashier, officers and agents, at pleasure, and appoint others in their place.

"§ 19. The shares of said association shall be deemed personal property, and shall be transferable on the books of the association, in such manner as may be agreed on in the articles of association; and every person becoming a shareholder by such transfer, shall, in proportion to his shares, succeed to all the rights and liabilities of prior shareholders; and no change shall be made in the articles of association, by which the rights, remedies or security of its existing creditors shall be weakened or impaired. Such association shall not be dissolved by the death or insanity of any of the shareholders therein.

"§ 21. Contracts made by any such association, and all notes and bills by them issued and put in circulation as money, shall be signed by the president or vice-president and cashier thereof; and all suits, actions and proceedings brought or prosecuted by or on behalf of such association, may be brought or prosecuted in the name of the president thereof; and no such suit, action or proceeding shall abate by reason of the death, resignation or removal from office of such president, but may be continued and prosecuted according to such rules as the courts of law and equity may direct, in the name of his successor in office, who shall exercise the powers, enjoy the rights and discharge the duties of his predecessor.

"§ 22. All persons having demands against any such association, may maintain actions against the president thereof; which suits or actions shall not abate by reason of the death, resignation or removal from office of such president, but may be continued and prosecuted to judgment against his successor: and all judgments and decrees obtained or rendered against such president, for any debt or liability of such association, shall be enforced only against the joint property of the association, and which property shall be

liable to be taken and sold by execution under any such judgment or decree.

"§ 23. No shareholder of any such association shall be liable in his individual capacity for any contract, debt or engagement of such association, unless the articles of association by him signed shall have declared that the shareholder shall be so liable.

"§ 24. It shall be lawful for such association to purchase, hold and convey real estate for the following purposes:

"1. Such as shall be necessary for its immediate accommodation in the convenient transaction of its business; or,

"2. Such as shall be mortgaged to it in good faith, by way of security for loans made by, or monies due to, such association; or,

"3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or,

"4. Such as it shall purchase at sales under judgments, decrees or mortgages held by such association.

"The said association shall not purchase, hold or convey real estate in any other case or for any other purpose; and all conveyances of such real estate shall be made to the president, or such other officer as shall be indicated for that purpose in the articles of association; and which president or officer, and his successors, from time to time may sell, assign and convey the same, free from any claim thereon, against any of the shareholders, or any person claiming under them."—[*Laws of* 1838, *ch.* 260, *p.* 245.]

Essence of a Corporation.

The ordinary incidents to a corporation are well stated by Chancellor Kent in his Commentaries. They are:—"1. To have perpetual succession, and, of course, the power of electing members in the room of those removed by death or otherwise; 2. To sue and be sued, and to grant and to receive by their corporate name; 3. To purchase and hold lands and chattels; 4. To have a common seal; 5. To make by-laws for the government of the corporation; 6. The power of amotion or removal of members." [2 K. Com. pp. 277, 278, 2d ed.]

Although these are the ordinary powers of a corporation, they are by no means peculiar to it. Every one of them probably, and most of them certainly, may be, and often are possessed and enjoyed by voluntary associations, in the form of copartnerships, or joint stock companies. And in this respect the associations

authorized by the Statute are like all other voluntary associations or copartnerships. For it must be admitted, that they have, substantially, many of the powers ordinarily possessed by corporations. But that circumstance is far from constituting them technically, legally, or really, bodies corporate. The members of a strict copartnership may agree in their articles of association to have succession, perpetual, or for a designated number of years; by admitting the representatives of every member who should die, or otherwise cease to be a member; or by electing a person in his place; or in any other mode their fancy or interest should suggest. They may also agree to have a common seal, and that it shall be affixed to all contracts, and that they will not he bound unless it is so affixed. And such an agreement would doubtless bind all the members fo the copartnership, and all persons who dealt with them and had knowledge of it. They may also, by agreement, make, or provide for making, by-laws for the government of themselves, their successors and agents; and provide for, and regulate the manner, and declare the cause of removal of the members of the copartnership. Yet copartnerships are not corporations. When viewed and compared in general, they are easily distinguished; but the task, I apprehend, is difficult, to ascertain satisfactorily, the unequivocal indicia, and the peculiar and distinctive characteristics of a corporation, which mark it, and distinguish it from every other legal or natural being. And the difficulty is increased by the consideration, that any one, more, or all, of the ordinary powers of a corporation, may be conferred by statute on a joint stock company, and still not give it the character of a corporation; and, on the contrary, a corporation may be created by statute, which has only one, or even none of the ordinary corporate powers, but others which better subserve the end of its creation.

Difficult, however, as the duty is, to ascertain and present the peculiar features and essential requisites of a corporation, its performance must be attempted in the course of this argument.

In this Country, there is only one mode of creating corporations, and that is by statute, or in other words, by grant, from the sovereign power. This is a well settled principle in our jurisprudence. Whatever diversity of opinion there may have been and still is, respecting the power of the Federal Government to create corporations, for purposes within its acknowledged powers and duties; all agree, that the several States have full authority to create them for all objects within the range of their legislative action. They have exercised this portion of sovereign power freely, and in some instances perhaps too freely; but an ample apology for this is found in the reflection, that strength lies in union, and emphatically so in this Country, yet in its youth and comparatively without capital. It has been only by uniting and combining our means and efforts, that the resources of the country have been so rapidly developed; and corporations have furnished a natural, safe and easy form of association.

The usual, and I think it may safely be said, the only mode of creating corporations in this country, is by clear and direct legislative enactment; declaring that certain persons thereby are, and shall be a body corporate; or, that if any persons shall perform certain prescribed acts, then they shall be a body corporate. In either case, the corporation is brought into being by the declared will of the sovereign power. It may be stated, without qualification, that there is not a corporation in this State, (and it is believed there is not one in this Country,) which has not been created by statute, containing a direct and explicit declaration of the will of the Legislature to that effect; and it may well be doubted, if not directly asserted, that a court ought not to hold an association to be a corporation, which the Legislature has not clearly declared shall be one. This view of the subject will be hereafter adverted to and more fully enforced.

As it is not pretended, however, that the associations under the General Banking Law are corporations, by virtue of a direct and unequivocal legislative enactment, but are so, in consequence of the Legislature having conferred on them corporate powers; let us meet the question, first, in this aspect.

The proposition being undeniable, that in this Country, and especially in this State, corporations can only be created by Statute, it is evident, that the Legislature must call them into being, either by a direct act, or, by conferring on voluntary associations the peculiar characteristics and essential requisites of a corporation. And the Counsel for the defendant contends, that the Legislature has, in the latter mode, constituted the associations authorised by the General Banking Law, corporations.

This leads directly to an inquiry after the peculiar features and essential requisites of a corporation.

The result of my reflection and investigation is, that there are only four distinctive indicia which mark an aggregate corporation, and separate it from every thing else.

They are,

First: *A collective existence by name, created by the sovereign power, exercised directly or mediately.*

This characteristic is often expressed in different language. Chancellor Kent calls it, "a capacity to have perpetual succession, under a special denomination, and an artificial form." [2 K. C. 277, 2d ed.] This phraseology indicates mere being by name, to which may be attached the qualities of beginning, end, pepetuity, enjoyment of rights and the performance of duties. Chief Justice Marshall, who always appears, when discussing a subject, to have his mind constantly fixed on the principles

and true nature of things, speaks of this feature of a corporation in this way: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it. * * * Among the most important are *immortality*, and, if the expression may be allowed, *individuality;* properties, by which a perpetual succession of many persons are considered as the same, and may act as the single individual." [Dartmouth College vs. Woodward, 4 Wheat. Rep. 636.]

The existence of a corporation enables many persons to have succession in the enjoyment of the franchise conferred; and if its existence is perpetual, then perpetual succession. Succession, however, is a property of the individuals who exercise the corporate rights. They succeed each other. But to say that the corporation itself has perpetual succession, which is the expression in general use, and sufficiently accurate for general purposes, appears to be a solecism. Besides, there may be aggregate corporations which have no succession. Twenty individuals may be incorporated on the principle of tontine, or in other words, till the death of all the corporators but one; and the share of each, instead of being transferable, to belong to the survivors, and the last one, to take the whole corporate fund. And in a great variety of other forms, aggregate corporations may be created, without giving to them the property of succession. Every corporation will be without it, whose charter confines the exercise of its corporate rights to certain designated individuals. *Perpetual* succession is wholly inapplicable to corporations created for a given time. It can only apply to those which have perpetuity, of which there are many, but not near so many as there are, whose existence is to continue for a definite period. Whatever there is of succession, connected with a corporation which has a fixed period for its termination, is *continued succession.*

But succession is not peculiar to corporations. It often is, and may always be, a property of voluntary associations, if the associates choose so to agree in their articles of association. Strict partnerships are frequently formed under an agreement to admit succession of membership. Almost all the voluntary associations which have been formed in this Country, within the last four or five years, and there have been not a few, for the purchase of, and speculation in lands, have contained provisions for succession of associates. The joint stock companies in England, for banking and other purposes, also have succession.

When, therefore, we apply the term *succession*, to a corporation, as a property peculiar to it, we express no more than mere *continuation* or *being*. A corporation has an existence independent of succession, and is known to the law without that property. In grants of lands to corporations, the word, "successors," though usually inserted, is not necessary to convey a fee simple. (Ang. and Am. p. 89, ch. 5, sec. 5.) An aggregate corporation includes the idea of an association of two or more individuals; and hence it is, *a collective existence.* And as its existence is only in contemplation of law, it can only be known by name; and hence is a collective existence, *by name.* And as it can only be created by the sovereign power, exercised directly in calling it into being, or more circuitously, by prescribing certain acts, the performance of which shall constitute a body corporate, embracing those who perform them, it is, *created by the sovereign power exercised directly or mediately.*

Creation by *sovereign power*, is the peculiar feature of the existence of a corporation. A partnership, joint stock company, and every other voluntary association, has a collective existence, and by name. But such existence and name rest on contract: they arise from the voluntary agreement of the asso-

ciates: they have their origin in the will of individuals. Not so with a corporation. It derives its being from a higher source, —from the sovereign power. The Legislature, in which that power rests, speaks, and the corporation comes into being, with the properties of beginning, continuance and end, unless the creating power declares its existence shall be perpetual—and then, with the properties of beginning and perpetual continuance. Not only the being itself, but the *name* also, by which it shall be known, must come from the same source, to distinguish a corporation from other associations. This name, too, in the language of the books, must be a *common* name; that is, fixed, uniform, unchangable, not dependent on the will of individuals. And although a corporation may have two names, one, "by which it may take and grant, and another, by which it may plead and be impleaded," (Ang. and Am. 56,) yet whatever name it has, must come, I apprehend, from the creating power, and be conferred by it. It is impossible to conceive of a legal entity, taking, giving, and enforcing rights, without a name. With its creation, therefore, must be given its name—they are inseparable. This intangible, invisible existence, can only be known by its proper designation, and the name must represent the collective existence, not an officer of the corporation, not an individual, not any thing, except the corporation. It is the *name* of the *corporation.*

SECOND: *A standing in Court as a collective existence, by a given name or designation, with the rights and liabilities of a party litigant.*

This is obviously an essential requisite of a corporation. It can neither have nor maintain a legal existence, unless it is able to resort to the judicial tribunals of the State to enforce its rights; nor could the community tolerate a being, which had power to enforce rights in its favor, and yet was not amenable

to the courts of justice, so that rights might be enforced against it. As parties cannot litigate in our courts without names, every corporation must have a name by which it can sue and be sued. This is a feature which clearly distinguishes corporations from voluntary associations. No such association can sue or be sued in its assumed name; but the parties, who compose it, must appear before the Court, or those in whom their property is vested in trust for them. The distinction is between the collective existence appearing by its name, and individuals appearing by their names. In the former case, the Court recognizes the body corporate as a legal existence, having a right to be heard; and in the latter, it recognizes individuals, who claim to be heard in their own right, or as trustees for others. The idea should be kept distinctly in view, that this peculiar feature of a corporation consists in the right of the *corporation itself* to appear in Court by its *own name*, and not in the name of one of its officers, or of any other person as a trustee for it. Voluntary associations, often, and municipal corporations, occasionally, are permitted by statute to sue and be sued in the name of some officer or trustee. The joint stock companies in England, I believe, are all permitted to sue and be sued in the name of any of their registered officers; and several of our cities and villages, which are municipal corporations, are allowed to sue in the names of their officers; but I am not aware that any private corporation in this State can sue or be sued, except in its corporate name. While a voluntary association may be allowed, by statute, to sue and be sued in the name of one of its officers, without thereby becoming a corporation; so, a corporation may, by a statutory provision, sue or be sued in the name of one of its officers, without losing its corporate character. But a collective existence, irrespective of individuals, suing and being sued by its name, is a peculiar property of a corporation, and belongs to no other kind of association.

THIRD: *Power to take and convey title to property, acquire and give rights as a collective existence, and by its given name or designation.*

This is another distinctive characteristic of a corporation, which separates it from all other associations. When a copartnership, or any other unincorporated company, takes a title to real or personal property, that title is conveyed to, or vests in the individual members of the company, or some of them, designated by agreement to receive it for the benefit of all. And when title is transferred by such an association to a third person, it is not conveyed by the company in its collective capacity, but by the individuals who compose it, or by those who hold the title for them. While the company buy with the common fund and sell to benefit it, and the transactions are, in fact, those of the association, the title to their property comes and goes, to and from, one or more individuals. A corporation, alone, of all associated action, takes and conveys title, acquires and gives rights, collectively and by its collective name.

FOURTH: *Power conferred by statute to make by-laws, or in other words, to prescribe rules of action for persons, without their consent.*

This power is always enumerated among the ordinary incidents to a corporation; but two distinguished writers have not considered it among the essential requisites. Chancellor Kent has not mentioned it, when stating the essence of a corporation; (2 K. C. 277, 2 ed.) and Mr. Kid expressly says, it "is not so inseparably incident to a corporation *aggregate*, that it cannot subsist without it; for there are some aggregate corporations to which rules and ordinances may be prescribed, and which they are bound to obey." (1 Kid. on Cor. 69.)

The Legislature may, undoubtedly, when creating a corporation, enact its by-laws, and prohibit it from making any others. So the Legislature may mould these artificial beings into any form, which the public interest may require, or even the fancy of a committee suggest; and give them all, or none of the peculiar features of a corporation, as has been already remarked. But when inquiring, as we now are, for the distinctive characteristics of a corporation, without reference to direct and effective legislative action, the question is not, what the Legislature, which has unlimited authority in this respect, can do, or might have done, in any given case; but what is the essence of a corporation, independent of the creative action of the sovereign power?—and we are not aided in the latter, by ascertaining the former. Hence, the remark of Mr. Kid, that the power to make by-laws is not an inseparable incident to an aggregate corporation, because rules and ordinances may be prescribed for some aggregate corporations, which they are bound to obey, appears to be unsound in principle, and his reason, to be wholly insufficient for his proposition.

The point of inquiry is, can a corporation exist, without by-laws? and if they are not made for it, by the power which creates it, must not the corporation itself have authority to make them? Chancellor Kent takes his statement of the essence of a corporate body from Mr. Kid, and cites him as his authority; (2 K. C. 277, 2d ed.) We have then only Mr. Kid's assertion, for he cites no authority, that power to make by-laws is not an inseparable incident to a corporation.

A corporation acts wholly by agencies. It can do nothing itself. It is a collective being, invisible, intangible, and exists only in contemplation of law. It is neither seen nor felt, except by its agents. Those agents are its officers and servants: they act under authority, and their duties and liabilities are re-

gulated and tested by the rules which regulate the relation of principal and agent. These are well established principles.

How can a corporation have an effective existence, without power to prescribe rules of action for its officers and servants? Let it have existence, a right to sue and be sued, and to take and convey title: can it then act efficiently? Does it not yet want one more requisite of life? Does it not want power to regulate and direct its action? And as it acts through the instrumentality of agents of all grades, from the president down to the servant, must not that power be one, which enables the corporation to prescribe rules of action for persons without their consent? The acts of every corporation in this State may be appealed to for the purpose of showing, that the exercise of this power is universal; and I doubt, whether there is a corporation in the State, which, if all its by-laws were repealed, and the power taken from it of enacting others, could fulfil the object of its creation; and if not, it must, of course, cease to exist. This power, too, must be exercised irrespective of the consent of the persons affected by it: otherwise, every member or agent of a corporation must express his consent to be bound by its by-laws; and when their efficacy depends on consent, their character is entirely changed. They then become matters of contract; they cease to be laws and become agreements.

Of the latter character, are all the rules and by-laws of voluntary Associations. Their whole basis is contract, and the superstructure is the same. Herein lies the difference between corporations and all incorporated companies. The former have authority from the sovereign power to make by-laws, and may, therefore, prescribe rules of action for persons without their consent; the latter have no such authority, and can only prescribe rules of action for their members, agents or others, with their consent; and thus the power to make by-laws which con-

trol the action of individuals without their consent, is a peculiar feature of a corporation.

The four requisites above stated, when united, constitute an effective being, which can perform the functions of legal life; and without either is helpless; unless the defect is supplied or other powers given by statute. But to give a voluntary association the character of a corporation, by reason of its possessing corporate powers, we must be satisfied, that it has *all* these four requisites.

Other properties have been said to be peculiar to corporations; but do not appear to be so, on reason or authority.

One of those is a *Seal.* Formerly it was held, that a corporation could only be bound by its seal; and when that was the rule, a seal was, of course, of the essence of a corporation. But that rule has been abrogated for years. And now, a seal, though an ordinary and very important incident to a corporation, is no longer an essential requisite. [*Steel* vs. *The Oswego Cotton Manufacturing Company*, 15 Wend. R. 265.] We must not, however, undervalue it. It may be stated, without the fear of contradiction, that the Legislature of this State has never incorporated a company by special or general act, without giving it a right to have a common seal. It is a universal index of a corporation, and will aid materially in the inquiry, hereafter to be instituted, respecting the intention of the Legislature, to constitute the associations in question, corporations.

Another, is the right "of enjoying privileges and immunities in COMMON."

Mr. Kid, in his introduction, [1 K. on Cor. 13,] specifies the properties of a corporation, and among them mentions this one. But in the body of his work, when enumerating the capacities,

"necessarily and inseparably incident to every corporation," does not mention this as one. [1 K. on Cor. 69.] Chancellor Kent, also, in his statement of the essence of a corporation, which, in this particular, is evidently taken from Mr. Kid's introduction, mentions the capacity to "receive and enjoy, in common, grants of privileges and immunities." [2 K. C. 277, 2 ed.] The right *to receive and enjoy grants of* privileges and immunities, is, in the opinion of all, an essential requisite of a corporation. It is but a different mode of expressing the right to take title to property; and to this leading idea, the Chancellor's mind was doubtless directed. The quality of enjoying privileges and immunities in *common*, to which Mr. Kid appears to have attached importance in his introduction, is incidentally thrown in by Chancellor Kent, and evidently without intending to present it as a necessery incident. No other author, and no adjudged case mentions this property as peculiar to corporations; and it certainly is not, for every voluntary association enjoys all its rights in common. Common enjoyment, common advantages are incident, and necessarily incident to every association. Nor is there any thing in the character of the objects enjoyed, viz: *privileges* and *immunities*. For the enjoyment of them is not peculiar to corporations. Chancellor Kent, in the sentence next to the one just quoted, thus expresses himself. "According to the doctrine of Lord Holt, neither the actual possession of property, nor the actual enjoyment of *franchises*, are of the essence of a corporation." [2 K. C. 277, 2 ed.]

Another, is the exemption of the members of a company from personal liability for its debts.

This is said, by some, to be peculiar to a corporation, and to distinguish it from a partnership. That is a mistake. Members of corporations are often made personally liable, by the acts of incorporation, for the debts of the company. Sometimes in whole, and sometimes in part. We have many instances of this

kind in our State, both in our general and special acts of incorporation. We have also a striking instance of members of a copartnership being liable, only to a qualified extent, for the copartnership debts. I allude to our Statute concerning limited partnerships.

The members of all voluntary associations may, by agreement, regulate the extent and nature of their liability for the company debts, and such agreement will certainly bind the parties to it, and, probably, all persons dealing with the association and having knowledge of it.

It may doubtless be safely assumed, that exemption, in whole or in part, of the members of a company from personal liability for its debts, is not an essential requisite of a corporation.

Another, and the last, is the transferability of shares without any restriction, at the mere will of the holder.

Were it not, that some English cases countenance the idea, that unqualified transferability of shares is a peculiar feature of a coporation, it would be unnecessary to dwell long on this topic. For it must be evident to all, that this is a matter which may be regulated by contract in all voluntary associations; and may exist, or not, in corporations. Partnerships and joint stock companies not only may, but do in fact, regulate the transfer of stock; sometimes permitting them, without any restriction; at others, restraining them to transfers on the books of the company; at others, until the debts due by the holder to the company are paid. And the like provisions are often made in our acts of incorporation; but more frequently the transfer of stock is left to the discretion of the corporation, with power to regulate it in their by-laws.

The cases referred to arose under an English Statute, which, with the decisions upon it, furnish the strongest judicial light I

have discovered on the subject of the essential requisites of a corporation; and, although the Statute is now repealed, the light, which it elicited, still shines, to aid and direct the search for truth. I will pass for the present, therefore, the subject of the transferability of stock, and endeavor by authority to show, that there are four, and certainly not more than four, essential requisites of a corporation, and that they are the same which I have already stated and attempted to illustrate.

The Statute and decisions are given by Collyer, near the close of his excellent Treatise on the Law of Partnership. [Coll. 620 to 625.] The Act, (6 Geo. 1 c. 18, s. 18,) after reciting, among other things, in substance, that several undertakings or projects of different kinds have, at times, been publicly contrived and practised to the common grievance of great numbers of subjects, and the persons who contrive them, presume "to open books for public subscriptions, and draw many unwary persons to subscribe therein, towards raising great sums of money." "And, whereas, in many cases, the said undertakers or subscribers have presumed to act as if they were corporate bodies, and have pretended to make their shares transferable or assignable without any legal authority," &c.; for remedy enacts, among other things, that all such undertakings, "and more particularly the acting, or presuming to act, as a corporate body, the raising, or pretending to raise, transferable stock, transferring, or pretending to transfer, or assign, any share in such stock, without legal authority, &c., shall be deemed illegal and void." A subsequent section declares these offences public nuisances, and subjects the offenders to the penalties of *præmunire*, to fines and punishments.

A single case occurred under the Act about two years after it was passed; a person being found guilty on an information, "for setting up a bubble called the North Sea." From that time until 1808, an interval of about eighty-seven years, the Statute

appears to have been forgotten. In that year a case occurred under it, and soon afterwards several others.

"The offences," says Mr. Collyer, "which are more particularly pointed out by the Statute, are, the presuming to act as a corporate body—the raising transferable stock—the transferring such stock; * * * * .

"With regard to the specific offences mentioned by the act, it seems to have been universally agreed, that the *acting as a corporate body* is an offence very difficult to be defined. It may perhaps be inferred, from other parts of the statute, that this enactment was directed against persons who pretended to be in possession of some charter of incorporation, and not against every species of society. But, however this may be, it seems to be unquestionable, that there are particular offences of this nature for which an indictment will lie, not only under the statute, but even at common law. It is apprehended, however, that the more general charge of acting as a corporation would not be sufficient to support an indictment at common law, but that there must be additional averments, stating with particularity the nature of the offence.*

"As to the particular offences alluded to, it seems more easy to say what is *not*, than what is an act of assuming a corporate capacity. It is clear, that the assuming a common name, for the purpose of designating the society, the using a common seal, and making regulations by means of committees, boards of directors, or general meetings, were not illegal within the statute, and are not illegal at common law. In the *King* v. *Webb*, Lord *Ellenborough* said—"As to the fourth point, that the subscribers have presumed to act as if they were a body corporate, how is this made out? It was urged that they assumed a common name, (which, however, does not appear to have been the case,) that they have a committee, general meetings, and power to make bye-laws; but are these the unequivocal *indicia* and characteristics of a corporation? How many unincorporated insurance companies, and other descriptions of persons, are there, that use their common name, and have their committees, general meetings, and bye-laws? Are these all illegal? or which of these particulars can be stated, as being of itself the distinctive and peculiar criterion of a corporation. So, in the case of *Ellison* v. *Bignold*,† where it appeared that the directors of an insurance com-

* See *M'Callum* v. *Turton*, 2 Younge & Jerv. 183.

† 2 Jac. & Walk. 503: and see *Pearce* v. *Piper*, 7 Ves. 1; *Carlen* v. *Drury*, 1 Ves. & Bea. 157. But Lord *Eldon's* opinions in these cases seem to have been guided by his own notion of the utility or inutility of each association as they passed in review before him. He seems to have considered, that the mischievous tendency of the associations was a question for the Judge and not for the jury. See *Lloyd* v. *Loaring*, 6 Ves. 776.

pany had, by their deed of settlement, the power of making orders and bye-laws, and that a seal was to be fixed upon for the use of the company, it was urged that this amounted to an assumption of a corporate character; but Lord *Eldon* appears to have taken no notice of this objection, and to have considered the legality of the association as depending entirely on the manner in which the shares were made transferable. In addition to these authorities we may add, that the numerous acts of Parliament for enabling certain companies to sue and be sued by their secretary, seem to assume the legal existence of the various powers of which we have just been speaking.

"It seems clear, therefore, that whether we view this subject with reference to the repealed statute, or the existing common law, they alone are to be considered as assuming to act as a corporate body, who usurp the "unequivocal *indicia* and characteristics which form the distinctive and peculiar criterion of a corporation." It is not to be doubted, however, that they who are parties to proceedings of this nature are guilty of an offence in law. Thus, corporate bodies alone can use a common name for the purpose of suing, contracting, conveying, or accepting conveyances; and to affect the use of a common name for these purposes, would, perhaps in every case, be contrary to law. Again, corporate bodies have the power of binding their members by the acts resolved upon in the manner prescribed by their charters, which power they derive from their corporate character, and not from contract and agreement between themselves;* on the other hand, voluntary associations are governed entirely by the rules which the parties have themselves agreed to. Hence, if the committees or meetings of an unincorporated society were to assume to exercise, independently of any contract or agreement for that purpose, a general power of binding their members, it might reasonably be contended that such an act was illegal and indictable. The only act, however, which has been expressly stated to be an assuming to act as a corporation, is that of making the shares *transferable, without any restriction, at the mere will of the holder.*

"The *universal* illegality of this proceeding was doubted, as we have before observed, by Lord *Ellenborough.* But, in *Joseph* v. *Pebrer,*† it was held to be universally illegal, not only, as it should seem, under the words of the statute on that particular point, but with reference to the more general offence of acting as a corporation. This manner of treating the subject leads to the conclusion, that, since the statute has been removed, a proceeding of this nature

* See *Adley* v. *Whitstaple Company*, 17 Ves. 315.

†3 Barn. & Cres. 639; 5 Dowl. & Ryl. 542.

is to be considered as an offence at common law; and the words of *Best*, C. J., in a subsequent case, are confirmatory of this opinion. "There can be no transferable share of any stock, except the stock of corporations, or of joint stock companies created by acts of Parliament. Indeed, the members of corporations cannot assign their interest, and force their assignees into the corporation, without the authority of an act of Parliament. Such authority is expressly given by the Bank acts, the South Sea acts, and by other statutes, creating companies that possessed stock, which it was deemed proper to render transferable. The pretending to be possesed of transferable stock, is pretending to act as a corporation and pretending to possess a privilege which does not belong to many corporations.*

"But where the shares are not transferable at the mere unrestricted option of the holder, the association, as far as relates to that matter, will be legal. In the case of The *King* v. *Webb*, which has been so often referred to, the shares could not be transferred to any person who would not enter into the original covenants: nor could more than twenty be held by the same person, unless they came to him by operation of law; and the object of the society, which was to supply the inhabitants of Birmingham, being shareholders, with bread and flour, virtually limited the transfer of shares to persons residing in the neighborhood. And the Court of King's Bench gladly availed themselves of these circumstances, in order to hold the association legal. So, in *Pratt* v. *Hutchinson*,† which was the case of a building company, no person could become a member of the company until he had made himself a party to the partnership articles, nor until he had been proposed and approved by a certain majority of persons present at the meeting of the society. And the Court held, that these restrictions on the transfer of the shares preserved the legality of the association."

From these cases, the difficulty is evident, of ascertaining, satisfactorily, the peculiar characteristics of a corporation. Aside from the transferability of stock, which will be hereafter examined, it would appear, that "corporate bodies alone can use a common name for the purpose of suing, contracting, conveying, or accepting conveyances;" and that they "have the power of binding their members by the acts resolved upon in the manner prescribed by their charters, which power they derive from their corporate character."

*4 Bing. 267.

†15 East, 511; and see *Davies* v. *Hawkins*, 3 Man. & Selw. 488.

These are, substantially, the second, third, and fourth requisites before stated. The first, viz., collective existence by name, is not alluded to in these cases, and doubtless because, the Statute did not declare it illegal to assume *to be*, but *to act*, as a body corporate, and the attention of the Court, consequently, was not turned to that feature of a corporation.

There is some further, though less direct light on the subject, in our own state.

This Court in the case of *The People* vs. *Morris*, [13 Wend. 335,] speak of the properties of a corporation in this manner—"They (towns) possess every requisite to constitute them corporations, besides being declared to be so by statute. Each town, as a body corporate, has capacity to sue and be sued; to purchase and hold real estate; to make such contracts, and hold such personal property as may be necessary to its corporate and administrative powers; and to make such order for the disposition, regulation and use of its public property as may be conducive to the interests of the inhabitants."

The Legislature declared, by statute, in 1830, what should be the incidents to all corporations thereafter created.

The Act is as follows:

"§ 1. Every corporation, as such, has power,

"1. To have succession by its corporate name, for the period limited in its charter; and when no period is limited perpetually:

"2. To sue and be sued, complain and defend, in any Court of law or equity:

"3. To make and use a common seal, and alter the same at pleasure:

"4. To hold, purchase, and convey such real and personal estate, as the purposes of the corporation shall require, not exceeding the amount limited in its charter:

"5. To appoint such subordinate officers and agents, as the business of the corporation shall require, and to allow them a suitable compensation:

"6. To make by-laws, not inconsistent with any existing law,

for the management of its property, the regulation of its affairs, and for the transfer of its stock." [1 R. S. 599—600.]

The first, second, fourth, and sixth incidents are essential; the third and fifth, ordinary and convenient.

The counties and towns of this State have, by statute, the essential requisites of corporations. [1 R. S. 364; 337.] The laws giving them are in the following words:

"§ 1. Each county, as a body corporate, has capacity,

"1. To sue and be sued in the manner prescribed by law:

"2. To purchase and hold lands within its own limits, and for the use of its inhabitants; subject to the power of the Legislature over such limits:

"3. To make such contracts, and to purchase and hold such personal property as may be necessary to the exercise of its corporate or administrative powers: And,

"4. To make such orders for the disposition, regulation, or use of its corporate property, as may be deemed conducive to the interests of its inhabitants."

"§ 1. Each town, as a body corporate, has capacity,

"1. To sue and be sued, in the manner prescribed in the laws of this State:

"2. To purchase and hold lands within its own limits, and for the use of its inhabitants, subject to the power of the Legislature over such limits:

"3. To make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its corporate or administrative powers: And,

"4. To make such orders for the disposition, regulation or use of its corporate property, as may be deemed conducive to the interests of its inhabitants."

The counties and towns, having been previously created, and then existing by name, became possessed, on the passage of these sections of the Statute, of all the essential features of corporations; and yet they are not considered, strictly, corporations. Chancellor Kent denominates them Quasi Corporations. [2 K. C. 278, 2d ed.] And this Court, in the case of *The People* vs. *Morris*, (13 Wend. R. 335,) holds them to be political, or municipal corporations. They are, certainly, not private cor-

porations; for, although they have all their essential requisites, they have other characteristics, so important and controlling, as to place them in another class of legal entities. They do not embrace a few individuals and exclude the many. They cover the whole community. All may come within their jurisdiction. They have legislative, judicial, and executive properties. Their powers are exercised for the public benefit, and not for the advantage or profit of a few. Their existence and properties show the uncontrolled power of the Legislature to create legal beings and cast them from any mould, new or old, and the impossibility of confining the exercise of that power to any known forms of legal existences.

Chancellor Kent has given the essence of an aggregate corporation with more accuracy than any other author. He says, "And the essence of a corporation consists only of a capacity to have perpetual succession, under a special denomination, and an artificial form, and to take and grant property, contract obligations, and sue and be sued, by its corporate name, and to receive and enjoy, in common, grants of privileges and immunities." [2 K. C. 277, 2d ed.]

No controversy has ever arisen, within my knowledge, except the present, which turned on the single question, what are the essential features of a corporation? The cases on the English Statute, blend that with other subjects, and not one of them is placed entirely on that ground. It is not strange, therefore, that there should be looseness of thought and inaccuracy of expression on the subject.

After giving to it the fullest reflection and examination in my power, I submit to the better judgment of the Court, the four essential requisites above stated, as the only ones which enter into and form the essence of a corporation.

The next step in the argument, is to examine our Statute which authorizes the business of banking, and see if the associations which it permits have these essential features of a corporation. Before proceeding to that, however, I will revert to, and dispose of, the alleged corporate feature, which consists of the transferability of stock.

It will be observed, that this property is not mentioned by any author, nor in any case, except the English cases, as a corporate attribute. It appears to have originated wholly from the English Statute; and the error of considering it a corporate property, has arisen, I apprehend, from a want of care in judging of it, as a distinct offence, which it is by that Statute, instead of judging of it as a corporate act, and as such, an offence by the Statute. A few references to the language of the Act, and the decisions upon it, will show this.

The recital is—"And whereas, in many cases, the said undertakers and subscribers have presumed to act as if they were corporate bodies, and have pretended *to make their shares transferable* or assignable without any legal authority," &c. And the enactment is, that such undertakings, "and more particularly the acting or presuming to act as a corporate body, *the raising, or pretending to raise, transferable stock, transferring, or pretending to transfer*, or assign any share in such stock, without legal authority, &c., shall be deemed illegal and void."

"The offences," says Mr. Collyer, "which are more particularly pointed out by the Statute, are, the presuming to act as a corporate body; the raising transferable stock; the transferring such stock."

The transferring of stock is thus obviously a distinct offence from that of presuming to act as a corporate body. Either might

be committed and punished without the other. Yet says Mr. Collyer, in a subsequent page—"The only act, however, which has been expressly stated to be an assuming to act as a corporation, is that of making the shares *transferable without any restriction, at the mere will of the holder.*" He adds—"The *universal* illegality of this proceeding was doubted, as we have before observed, by Lord Ellenborough. But in *Joseph* v. *Preber*, [3 Barn. & Cres. 639; 5 Dowl. & Ryl. 542,] it was held to be universally illegal, not only as it should seem, under the words of the Statute on that particular point, but with reference to the more general offence of acting as a corporation." C. J. Best, in a subsequent case, [4 Bing. 267,] says: "There can be no transferable share of any stock, except the stock of corporations, or of joint stock companies created by acts of Parliament."

This language is loose and confusing, and clearly shows, that the minds of these distinguished jurists were far from being directed to the question, whether transferability of stock is an essential property of a corporation. C. J. Best states it in substance, as an unqualified proposition, that shares of stock are not transferable, except by act of Parliament. With great respect, that is an error. The stock in every voluntary association, by agreement of the associates, may be transferable at the will of the owner, as has been already stated and illustrated; and daily practice confirms it.

But from whatever source the notion came, that transferability of stock was an exclusive attribute of a corporation, or however well it is sustained by authority, one position respecting it is clear, and in that all the cases concur, viz: that to render the transferability of shares, a corporate property, *the shares must be transferable at the mere unrestricted option of the holder.* And where the shares could not be transferred to a person who

would not enter into the original covenants: and where the same person could not hold more than twenty shares; and where the transfer of shares was limited to persons residing in the neighborhood; and where a person could not become a member of a company till he had signed the partnership articles, nor until he had been approved by a certain majority of persons present at a meeting of the society—the Court of King's Bench gladly availed themselves of these circumstances, to hold the associations valid, under the English Statute, and of course, that such restricted transferability was not a corporate attribute. [Collyer 624, 625, and cases there cited.]

There is only one clause in our General Banking Law which regulates the transfer of stock; and that, instead of permitting the shares of the associations, to be transferred at the mere, unrestricted option of the holder, subjects them to two statutory restrictions, and also to as many others as each association may think proper to impose. The words of the clause are, "The shares of said association shall be deemed personal property, *and shall be transferable on the books of the association, in such manner as may be agreed on in the articles of association;* and every person becoming a shareholder by such transfer, shall, in proportion to his shares, *succeed to all the rights and liabilities* of prior shareholders."

FIRST: The shares are transferable *on the books* of the association.

SECOND: The transferee succeeds, not only to the rights, but to the *liabilities* of the prior shareholders. These are imposed by law upon him.

THIRD: The shares are transferable on the books of the association, *in such manner as may be agreed on in the articles of association.* This enables each association to impose just

such restrictions as it pleases; and so obviously is the holder of stock in the associations restrained from transferring his stock at his *mere unrestricted option*, that it seems unnecessary to occupy more time with this topic.

Examination of the Statute.

The way now appears open, to examine those parts of our General Banking Law, which are supposed to confer corporate powers on the associations which it authorizes, and ascertain, whether the associations have all, or any of the four essential requisites of a corporation before stated.

FIRST: *Has every association a collective existence by name, created by the sovereign power, exercised directly or mediately?*

There are only parts of two sections of the Statute which relate to this corporate feature, viz: the first clause of the fifteenth section, and the first and fifth sub-divisions of the sixteenth section. They are,

"§ 15. Any number of persons *may associate* to establish offices of discount, deposit and circulation," &c.

"§ 16. Such persons, under their hands and seals, shall make a certificate which shall specify:

"1. The *name assumed* to distinguish such association, and *to be used in its dealings*."

"5. The period at which such association shall commence and terminate."

The force and true meaning of the clause of the fifteenth section cannot be fully apprehended, without reading it in connection with the act to restrain unauthorized banking. That act is as follows:

"§ 1. No person unauthorized by law, shall subscribe to, or become a member of, or be in any way interested in, any association, institution or company, formed, or to be formed, for the purpose of receiving deposits, making discounts, or issuing notes, or other evidences of debt to be loaned or put in circulation as money." &c.—(1 R. S. 711.)

Who can fail to see, that the object of passing this clause of the fifteenth section of the General Banking Law, was to repeal, in effect, the first section of the Restraining Act, and open banking to the community? The Legislature evidently intended to allow any person, who chose, to become a member of an association to conduct the business of banking. And when they say, "any number of persons *may associate* to establish," &c., is it not a perversion of their language, to insist, that they thereby call into being an indefinite number of corporations? The enactment is merely permissive. It only removes a previous legal restraint, and allows free action. It creates nothing; but allows parties to contract with each other to accomplish an object theretofore unlawful. This will appear the more evident, by comparing the language with that of our general acts of incorporation. Take, for example, the Act relative to incorporations for manufacturing purposes. The first section directs, that "any five or more persons, who shall be desirous to form a company," &c., "may make, sign, and acknowledge, before a justice of the Supreme Court," &c., "a certificate in writing, in which shall be stated the corporate name of said company," &c. And the second section enacts, "that as soon as such certificate shall be filed as aforesaid, the persons who shall have signed and acknowledged the said certificate, and their successors, shall, for the term of twenty years next after the day of filing such certificate, be a body politic and corporate, in fact and in name, by the name stated in such certificate, and by that name," &c. [3 R. S. 310.]

Under this law, a corporation is brought into existence by legislative enactment. Under the General Banking Law, an association is formed by contract, by agreement of the parties. By that law, any number of persons may associate—and if they *do associate*, it is their own voluntary act; and their association derives its being from their mutual consent—and in like manner, may be dissolved at their pleasure. They are allowed by agree-

ment to fix the period of its commencement and termination, as in all other cases of voluntary associations—time of commencement and dissolution, like a strict co-partnership; and if the parties are dissatisfied with each other, or the business, they may by general consent dissolve at any time before the period fixed for the termination of the association. In these respects, the associations are wholly unlike corporations. The latter always have a period fixed by law for their commencement and termination, unless they are perpetual; and then, their perpetuity is likewise declared by law, and it is not in their power to dissolve themselves. They may commit acts which forfeit their existence, but cannot dissolve at pleasure.

Furthermore: it is understood to be the true construction of this Statute, and that such construction was deliberately given to it by the late Comptroller and Attorney-General, after full and mature examination, to authorize any individual to conduct the business of banking according to its provisions. And it is a well known fact, that several individuals have deposited their respective securities with the Comptroller, received bills, and are now prosecuting the business of banking in their respective offices, and on their respective accounts. If this is the true construction of the Act, and there appears to be no reason to doubt it, there would seem to be an end of all pretence even, that those who avail themselves of its provisions are corporators. The Statute certainly does not constitute each of the individuals referred to, a corporation, or, in other words, give each of them a corporate existence.

Nor does the statute give a name to the association formed under it, as is always the case, when a corporation is created; nor does it adopt any selected by the parties, as in the general act of incorporation for manufacturing purposes. The name of each association is given by agreement of the associates. They

determine and agree what it shall be. It is given by contract and not by Statute. It comes from the will of individuals, and not from the one sovereign power. Besides, the associations have no common name by which they are known; by which they take and give title and make contracts, and by which they sue and are sued. Nor have they two names, one by which they may take and grant, and another, by which they may sue and be sued. They have only one name, and that for a single purpose, viz: "to be used in their dealings." They neither take, nor grant, nor make contracts in that name, nor do they sue, nor are they sued by it, as will be more distinctly seen when other sections of the Statute are examined.

SECOND: *Has every association a standing in Court, as a collective existence by a given name or designation, with the rights and liabilities of a party litigant?*

The clauses of the Statute which relate to this part of the subject, are found in the twenty-first and twenty-second sections. These are as follows: "and all suits, actions and proceedings brought or prosecuted by or on behalf of such association, may be brought or prosecuted in the name of the president thereof." "All persons having demands against any such association, may maintain actions against the president thereof."

The ground taken by the Counsel for the defendant is, that the suits permitted by these provisions of the Statute, are to be brought and prosecuted in the name of the *office* of the president of the association, and not in the name of the person who fills the office—and that each association has, therefore, a name given to it by Statute, by which it sues and is sued.

This is obviously an erroneous construction of the Act. The title of this very cause is a practical evidence of the error. It is in the name of *Anson Thomas*, president, &c.; and not in the

name of *The President* of the Bank of Central New York. The language of the Statute shows, that the office of president is referred to as a mere description of the person, in whose name the suit may be brought, and against whom it may be maintained. The words are; "all suits, &c., "may be brought or prosecuted *in the name of* the president thereof," and not in the name of the *office* of president thereof. So, "all persons" &c., "may maintain actions against *the president* thereof," and not against *the office* of president thereof. But there are other clauses in these same two sections of the Statute which are conclusive of its construction.

If the suits may be brought in the name of the office of president, or maintained against the office of president; then no suit, brought in the name of that office, or against it, would abate by the death, resignation, or removal of the officer. But in the twenty-first section, the Legislature provide; that no "suit, action, or proceeding," "brought or prosecuted in the name of the president thereof," "shall abate by reason of the death, resignation, or removal from office of *such president*, but may be continued and prosecuted according to such rules as the courts of law and equity may direct, *in the name of his successor in office.*" So also, in regard to suits against the president, the twenty-second section contains the following provision; "which suits or actions shall not abate by reason of the death, resignation, or removal from office of *such president*, but may be continued and prosecuted to judgment against *his successor.*"

After reading these provisions, argument surely is unnecessary to show, that the suits are to be brought in the name of, and against the person holding the office of president; and that the office is used in the Statute merely as a description of the person.

Another consideration arises in this connection; and that is,

that when a president, who is either plaintiff or defendant, dies, the suit, though not abated, is suspended, until a successor is appointed; and when so appointed, the suit does not proceed, of course, against him without any proceeding in court, but "according to such rules as the courts of law and equity may direct." Which proceeding would naturally be, a suggestion on the record of the death of the president in whose name the suit was pending, and the appointment of his successor, and an order thereon, that the suit proceed in the name of the successor.

How unlike is all this to a corporation! A corporation never dies; that is, if not perpetual, it lives out its known and appointed day. It has, as we have already seen, a *continued existence*, or, in other words, a *continued succession*. A suit in its name never abates; for it never dies, resigns, or removes. What sort of a corporation, therefore, must that be, which has not a *continued existence* by name, so as to have a continued standing in court?

But again: The Statute in respect to suits brought in the name of, or against the president, is only permissive. The language is, "all suits," &c., "*may* be brought," &c.; "all persons," &c., "*may* maintain actions," &c.

Hence, any association, or individual, who is banking under the law, may sue, the former, in the name of the association, and the latter, in his own name. In like manner, any creditor of any such association, or individual, may sue the associates, or individual. Either course would undoubtedly be attended with great difficulties in respect to parties, when such a suit should be attempted in favor of, or against, the members of an association; and probably would be impracticable for any useful end; but still, the right so to sue remains.

Here, it may be said, how *entirely* unlike a corporation! There is not even an approach to an analogy. A right to sue in the name of the individual members of a company is an exclusive attribute of a voluntary association; it has not the most distant resemblance to a corporate power.

A suggestion was made by the Counsel for the defendant, in the course of his argument, that the statutory provision in the twenty-second section, that "all judgments and decrees obtained or rendered against such president for any debt and liability of such association, shall be enforced only against the joint property of the association, was analogous to the legal effect of a judgment against a corporation. And so it is. But what of that. Many rights and liabilities of voluntary associations are analogous to those of corporations. The question is, whether it is a peculiar feature of a corporation. If it is, then several other statutory provisions in regard to judgments upon joint liabilities may be said to have the same effect.

Our Statute declares that on the arrest of one of several joint debtors, a judgment may be rendered against all, and enforced against the joint property of all. [2 R. S. 377.] The statutory regulation of suits by and against a limited partnership is, that "suits in relation to the business of the partnership, may be brought and conducted, by and against the general partners, in the same manner as if there were no special partners." [1 R. S. 766. §14.] The effect of the judgment, of course, is to bind the copartnership property. This legislative enactment, respecting suits by and against limited partnerships, is very similar in form, and cannot be distinguished in substance, from that respecting suits by and against the banking associations; and yet, I apprehend, that no one ever seriously thought a limited partnership had any thing in common with a corporation; except, perhaps, that in Chancery, the general partners, as lately held by the Chancel-

lor, and the directors of a corporation, are responsible as trustees of their respective common funds. But such responsibility is far too general, to be called a peculiar corporate attribute.

THIRD: *Has every association power to take and convey title to property, acquire and give rights as a collective existence, and by its given name or designation?*

The parts of the Statute supposed to be applicable to this feature of a corporation, are in the twenty-fourth section. That section, after specifying the purposes for which an association may purchase, hold and convey real estate, enacts; "and all conveyances of such real estate shall be made to the president, or such other officer as shall be indicated for that purpose in the articles of association; and which president or officer, and his successors, from time to time, may sell, assign, and convey the same," &c.

On comparing this provision of the Statute, with what has been said concerning, and in illustration of this third corporate feature, the wide difference will be seen, between a corporation's taking and granting, by its corporate name, and taking and granting in the manner directed by this Act.

There is no room to doubt, but that every conveyance is to be made to the *person* who fills the office of president, or to some other person who holds some other office in the association. The associates of each association have, therefore, a right of selecting a trustee of their real property from the whole body of their agents, from their president down to their porter. The Legislature has not even designated the trustee. They have only said, if you select none for yourselves, then we will select for you, your president; but, as we allow you to elect your president and other officers, we give you unrestricted choice. The right of selection, therefore, is uncontrolled; and is as full, as

the right of the members of any voluntary association, to select a trustee for themselves, to take the title to their real property for their benefit.

It appears to be so clear, that the associations do not take or grant real estate by their collective name, if they can be considered as having one for any purpose, that it seems unnecessary to spend more time with this branch of the argument.

The next question is, where is the title to the personal property of the associations? The answer is obvious. The Statute having made no provision on the subject, it is where the common law places it, viz: in the members of the respective associations; and subject to such custody, control and management, as they have designated and agreed to, in their respective articles of association. And this shows, that the right, still belonging to the associations, to sue in the names of their members, is no shadow, but a practical reality.

The vesting of the title of the real property of the associations in a trustee, who is always selected by themselves; and of their title to their personal property, in the members of the associations, shows how impossible it is, to hold them to be corporations.

FOURTH AND LAST: *Has every association power conferred by the Statute to make by-laws, or in other words, to prescribe rules of action for persons without their consent?*

The only expression in the Statute, which, by the greatest stretch of imagination, can be said to have any relation to this power, is found in the eighteenth section; that section gives and prescribes the power of the associations, and states it to be, "to carry on the business of banking, by discounting bills," &c., *in*

the manner specified in their articles of association, for the purpose authorized by this act.

On this part of the subject, it seems sufficient to say, that whatever authority is given to the associations by these words of the Act, such authority is merely *permissive*, and that, whatever regulations or rules it authorizes the associations to make, such regulations and rules are to be specified in their articles of association; and, of course, are purely matters of contract, and derive their whole force and authority from the consent of the parties to be bound by them.

This, as we have seen, is a feature peculiar to the by-laws of voluntary associations, and distinguishes them from corporations. The by-laws of the latter, deriving their force from the Statute, and emanating from the sovereign power, bind those subject to them without their consent; while those of the former, deriving their force from consent, and emanating from contract, only bind those subject to them with their consent. The very terms employed, show the difference between incorporated and unincorporated companies; and terms are no unimportant indication of thought. The former is a corporation, the latter a *voluntary* association; the former, exists by force of a statute—the latter, by force of a *contract;* and so their respective by-laws: one binds by *contract*, and the other by *Statute.*

In concluding this analysis and examination of the Statute, one remark seems to be required in regard to these associations having, in different forms, several of the general powers of corporations. It is true that they have; and so have all citizens of full age, all voluntary associations, and every being, who has and exercises legal rights, and prosecutes judicial remedies.

Franchises are rights which can only emanate from the sovereign power, and are generally granted to corporations, but often

to individuals, and companies not incorporated; and the Legislature oftentimes confers the privilege of possessing and enjoying property, and exercising rights, upon persons and associations, not otherwise allowed by law—and such privilege is also generally conferred in the form of an act of incorporation: hence, at an early day, the idea was suggested, that these were incidents to corporations; but they are not peculiar to them, and so it has been decided in England. Lord Holt, in the case of the *The King*, vs. *The City of London*, (Skinner's Rep. 310,) held, that neither "the actual possession of property, nor the actual enjoyment of franchises, are of the essence of a corporation:" and this position has received the sanction of Chancellor Kent, in his valuable commentaries. [2 K. C. 277, 2 ed.]

Had these associations been authorized in the very form they now are, but to carry on some other business than banking, hitherto conducted in this State solely by corporations, it probably would never have entered into the mind of any man to think they were corporations, or even like such bodies, though his ingenuity may have been on the rack, for some plausible ground for a dilatory defence to a just demand.

The Statute must be considered, as a modified repeal of the Restraining Act, and in thus repealing it, the Legislature have thought proper, and for the very best reasons and most laudable motives, to protect the community from injury, while they restored to every citizen, his unquestioned right to use his funds for banking purposes. In doing this, the Legislature thought it judicious, to require from the associations, full semi-annual statements of their affairs; [Section 26, of the Act,] as the law then and still requires like annual statements from the incorporated banks of this State, [1 R. S. 593, §19, 20; 3 R. S. 287, §31;] to keep a certain amount of specie on hand, [§33, of the Act;] and other like regulations for the public security; and

these have been alluded to by the Counsel for this defence, as showing that the associations are corporations. With equal soundness and cogency might he argue, that because a corporation can maintain a suit by its corporate name, and an individual can maintain one by his name, therefore, a corporation is an individual.

One proposition is self-evident, and although alluded to heretofore, should be distinctly stated in this place, and that is; if these associations are corporations by reason of possessing their essential requisites, they must have *all* those requisites, whatever they are—or in other words, must have the essence of corporations. If there are four *essential* requisites, and they have but three; or there are three, and they have but two; or there are two, and they have but one; they cannot be corporations.

On the whole, we insist, that these associations, judged of solely by the power and attributes given to them by the Statute, do not possess the essential requisites of corporations, and, of course, are not for that reason, corporations.

It is admitted, as has already been stated, that they are not so by explicit legislative enactment—and as corporations can only be created in one or the other of these modes, the argument seems conclusive.

But there is yet another and controlling argument against these associations being adjudged corporations, and that is derived from the manifest intention of the Legislature.

Intention of the Legislature.

The first evidence of that consists, in not only the entire omission of the Legislature to declare, by direct and explicit enactment, that the associations shall be corporations, as they have done in every case, without exception, where corpora-

tions have been created by special or general acts; but in their caution, manifested throughout the whole Statute, to avoid every expression which might countenance such an idea. No person can read this Statute and hesitate for a moment in saying, that the Legislature never intended to constitute these associations corporations. If they had, how obvious the course. They had only to adopt the forms of some of our other general acts of incorporation; but, instead of that, they have studiously avoided all of them. There is a single provision in the Law, which of itself is decisive of the intention of the Legislature. I allude to the clause in the nineteenth section, that, no association shall "be dissolved by the death or insanity of any of the shareholders therein". Why such a provision, if these associations are thought, or intended to be corporations? But if voluntary associations, then it was pertinent and proper; and like similar provisions often introduced into articles of co-partnership and joint stock companies, where there are numerous members, and consequently frequent deaths.

History of the Statute. The history of the origin, progress, and final passage of the Statute, also shows, with unvarying light, the intention of the Legislature.

It may not be time mispent, to give a pretty full account of this important Statute, which already exercises a great, and must hereafter, a far greater influence on the business, morals, and destiny of this State. By reason of my professional connection with one of the principal institutions organized under it, on a cash capital, and the very first of that character which was organized in the State,* I have bestowed great attention on this Law, and feel an unwavering assurance, vastly increased by the argument of this cause, that it will confer unnumbered bless-

* I allude to "The American Exchange Bank," established in the city of New York, the project of which was formed and presented to the public by the Board of Trade of that city.

ings, not only on the people of this State, but on the whole Country; that it will form an era in our legislation and business, which will be remembered and felt for good, as long as the institutions of the Country shall stand. It has already destroyed banking monopoly, and purified our legislative halls—of themselves a sufficient eulogy—but it furnishes the people a safe and convenient currency; opens the business of banking to fair competition; encourages industry, commerce, and the mechanic arts, and holds them in steady courses. I must not, however, dwell on these topics, pleasing and full of hope and cheering anticipation as they are.

The project of a General Banking Law was first brought fully to the attention of the Legislature in 1837. During the session of that year, numerous petitions were presented from different parts of the State, praying for such a law.

Mr. Cutting,* a member of the Assembly that year from the city of New York, has the honor of introducing the first bill for legislative action on this important subject. On the 11th February, 1837, he gave notice of his intention, on some future day, to ask leave to bring in a bill, "to amend the act relating to limited partnerships;" and, accordingly, on the 23d of that month, he introduced a bill, on leave, entitled, "An Act in relation to limited partnerships, and to authorize assignable interests therein." I have not seen this bill, as introduced by Mr. Cutting, but there is no doubt it was a bill, in substance, to authorize the business of banking. On the same day, and after Mr. Cutting had introduced his bill, and after it had been read the first and second time, the Assembly directed their "committee on the incorporation and alteration of the charters of banking and insur-

* Francis B. Cutting, Esq., a member of the Bar in the city of New York. Although Mr. C. is yet classed with the junior members of his profession, he is rapidly advancing in usefulness and reputation, and must soon enjoy the highest honors of the Bar. He is already entrusted with the management of causes of the greatest importance, which he always conducts with distinguished ability.

ance companies, as soon as practicable, to report, for the action of the House, a general bank law." On the 3d of March following, Mr. Robinson, from that committee, reported a bill, entitled, "An Act to authorize associations for the purposes of banking." These two bills were referred together to a committee of the whole, on the 14th of that month. They were often before that committee, until the 22d of that month, when the committee, not having acted definitively on the bill introduced by Mr. Robinson, reported on that introduced by Mr. Cutting, that they had amended and agreed to it. The House accepted this report by a vote of sixty-five to forty-one, and ordered the bill engrossed. It came up for a third reading, and was read the third time, the next day, when a motion was made to lay it on the table, which carried by a vote of sixty-six to forty-three. On the 6th of April following, the committee of the whole again took up the bill introduced by Mr. Robinson, and after having had it before them on several different days, reported to the House, on the 11th of that month, that they had amended and agreed to it. The report was laid on the table. On the 13th, this bill was referred to the Attorney-General, "with instructions to report his opinion as to the constitutionality of the provisions thereof; and also, whether, in his opinion, the passage of the said bill requires the assent of two-thirds of the members elected to each branch of the Legislature, to pass the same; and if, in his opinion, any of the provisions of the bill are unconstitutional, that he specify in what respect particularly." On the following day, the bill introduced by Mr. Cutting was also referred to the Attorney-General, with substantially the same instructions. He reported upon both bills four days afterwards, viz., on the 18th of April. His opinion on the bill "to authorize associations for the purpose of banking," is more full than on the other, as in that, he states at large his reasons for his opinion on both. That opinion was, that both bills were unconstitutional, and that each required a two-thirds vote to pass it. I

shall hereafter examine fully the principles and reasons of his opinion on these bills; but at present, it is sufficient to state the facts, and his conclusions upon them.

In his opinion on the bill first referred to him, he says:

"The bill referred to the Attorney-General, declares that associations for banking, may be formed by twenty or more persons, 'with the rights and powers, and subject to the conditions and liabilities' in said bill prescribed. (§1.) The capital stock of the association is to be divided into shares, and which shares are to be personal property. (§ 3, 31.) It shall continue for twenty-five years, and 'be composed of persons who shall from time to time be stockholders.' (§ 4.) It shall not be 'dissolved by the death or act of any stockholder.' (§ 31.) Its concerns are to be conducted by directors, and to whom the capital stock is to be paid.' (§ 2, 8.) The 'association shall have power to carry on the business of banking' in all its branches, including 'the issuing of bills, notes and other evidences of debt, and may exercise such other incidental powers as shall be necessary to carry on such business. It may make by-laws for the management of its property, the regulation of its affairs, and for the transfer of its stock. (§ 11.) It may purchase, hold and convey real estate for particular purposes, and under particular circumstances: but not "in any other case or for any other purpose." (§ 12.) It shall take a name and by which it must contract, but it must sue and be sued in the name of the office of president of the association, "without naming the individual." Suits by and against the "company" are to be prosecuted "in the same manner and with the like effect as suits and proceedings by and against corporations," and judgments and decrees therein shall be executed in the same manner. (§ 3, 14.) Officers and stockholders shall be liable and answerable in the same cases, to the same extent, and in like manner, as the officers and stockholders of incorporated banks created since the year 1828. (§ 15.) The obligations and contracts of the association "shall be obligatory on the association, and be assignable and negotiable in like manner as if made or issued by a private person.' (§ 17.) These associations are declared to be subject to the provisions of the safety fund law of 1829, and to all general laws in force in relation to incorporated banks. (§ 27, 1, 37.) Their capital is to be taxed like that of incorporated banks, and the stockholders, are in like manner exempt from taxation. (§ 34.)

"The bill was manifestly designed to confer on banking associations, which may be organized under its provisions, every essential attribute of a corporation.

"Every such association is to have succession by the name it takes, for twenty-five years. It 'shall be composed of the persons who shall, *from time to time*, be stockholders in the same.'

"It may sue and be sued, complain and defend, *in the name* of the office of president of the association.

"It may hold personal property, and also hold and convey certain real estate, *in the name* it assumes.

"It may appoint subordinate officers and agents to transact the business of the association.

"It may make by-laws for the management of its property and the regulation of its affairs.

"It may enter into contracts, incur debts, and carry on the business of banking in all its branches.

"It is taxable like a monied corporation.

"An artificial legal person is thus created. As a person it has the ordinary rights of property. It may enter into contracts, prosecute and defend suits, and do all other things contemplated by the bill, as a natural person may.

"Title to property and rights of action, can vest only in natural or artificial persons: there is no intermediate state or condition in which they can exist. An unincorporated association has none of the attributes or capacities of a legal being; it cannot sue; as an organized assemblage it is unknown to the law. The individuals of which it is composed, have rights, but the association, as such, has none." [Assembly Doc. 1837: No. 303, pp. 5, 6, 7.]

His conclusions were:

"1. That the associations which this bill assumes to authorize, would be bodies corporate;

"2. That as it thus assumes to create corporations, it requires the assent of two-thirds of the members elected, to its passage;

"3. That the bill is unconstitutional, as it assumes to authorize the creation of an indefinite and unlimited number of bodies corporate, and should it pass into a statute, and associations be formed under it, they would, for the purposes contemplated, be absolutely null and void. [Ib. p. 9.]

Mr. Beardsley's opinion on the other bill is more brief. He barely states the contents of the bill in detail, shows what they are, as he understands them: and then, his two conclusions—as follows:

"1. That such partnerships as are contemplated by the bill would be bodies corporate, and that the assent of two-thirds of all

the members elected, is requisite to the passage of a bill for their creation.

"2. As the bill assumes to provide for the creation of an unlimited and indefinite number of these corporations, at the mere pleasure of individuals, it is for that reason unauthorized by, and in derogation of the constitution." [Ib. Doc. No. 304, p. 7.]

On the 25th of April, the Assembly, on motion of Mr. Robinson, "Resolved, that the General Banking Law, together with the opinion of the Attorney-General thereon, be referred to a select committee, to consider and report thereon." Messrs. Robinson, Clinch, and Patterson, were the committee.

On the 29th of April, that committee, by Mr. Robinson, reported:

"That they have carefully examined the different sections of the bill under consideration, and compared its several provisions with the constitutional objections raised by the Attorney-General; and have made such amendments thereto as, in their opinion, deprives the bill of those attributes which, in the view of the Attorney-General, would require the assent of two-thirds of the members elected, to its passage. Your committee are also of opinion, that the bill, as now amended, will not conflict in any other particular with the ninth section of the seventh article of the constitution as construed by the Attorney-General.

"Your committee have not deemed it a necessary part of their duty to investigate the validity of the objections raised by the Attorney-General to the bill on which his opinion was required; they therefore do not report any conclusion thereupon.

"The bill, as amended by your committee, is herewith presented, and this report respectfully submitted." [Ib. Doc. No. 318.]

This report was unanimous, having been signed by all the committee.

Two days afterwards, viz., on the first day of May, the House went into committee of the whole on the bill, amended it, as recommended by the committee, and agreed to it; and the report of the committee was accepted by a vote of forty-nine to twenty-six, and the bill ordered to be engrossed. It was read the third time the next day, and referred to the Committee on two-thirds

bills, to consider and report upon it. That committee reported the day following, that, in their opinion, it was not a two-thirds bill, and it was ordered to a third reading, passed, and sent to the Senate.

Some very early movements, of a general character, were made in the Senate in 1837, on the subject of a general banking law.

On the 20th of January, Mr. Loomis, a Senator from the Seventh District, offered a resolution, "That the committee of the whole be discharged from the further consideration of the petition praying for the passage of a law authorizing a general system of banking within this State; and that the said petition be referred to a select committee, to consist of one Senator from each Senate District, with instructions to report a bill for that purpose." On the same day, Mr. Dickinson, a Senator from the Sixth District, offered a resolution, "that the committee on banks and insurance companies, be instructed to inquire into the expediency of passing a general banking law," to contain certain principles and provisions, which were specified in the resolution, of rather an ultra character. This resolution was laid on the table, and does not appear to have been called up afterwards.

On the 27th of January, the Senate took up the resolution offered by Mr. Loomis, passed it, after striking out the instructions, and appointed a committee under it, consisting of Mr. Loomis, Mr. Young, from the Fourth District; Mr. Huntington, from the Sixth; Mr. Tracy, from the Eighth; Mr. Sterling, from the Fifth; Mr. Livingston, from the First; Mr. Johnson, from the Third; and Mr. Van Dyck, from the Second.

This committee reported by Mr. Young, on the 18th of April following; at which time, the Assembly were engaged almost daily upon the two bills before it, on the same subject. The report is full, on the whole subject of banking, and shows that the

committee had given it great attention. With their report, the committee presented a bill, "to authorize associations for the purposes of banking."

A few extracts from this able report, will exhibit the views of the friends of the measure in the Senate.

"The committee feel themselves called upon, under the reference which has been made to them, to allude to the origin of the present system of bank corporations, and to point out some of the most prominent evils which are necessarily connected with the monopoly character of those institutions.

"These evils have been experienced by the community for many years; and the time seems to have arrived, when it is proper to devise, if possible, a system which is more free and more equal in its operation; and which, unshackled by useless restraints, and unprotected by chartered privileges, shall permit the flow of a circulating medium through all parts of the State, as the exigencies of trade and the pulsations of business require. [Sen. Doc. No. 55, 1837, p. 1.]

"But however onerous the exactions which monopolies ever impose, there are other objections to the system of a more formidable character, some of which are inseparable from it, and put all palliation at defiance. The provision in the Constitution, requiring two-thirds for the passage of a bill creating a corporation, adds to the difficulty of procuring a charter. This difficulty can be obviated only by securing, in both houses, the requisite number of votes. Applicants for bank charters, are thus induced to ascertain all the projects that are pending, to cultivate an alliance with each other, and to make themselves acquainted, if possible, with every member who is charged with any favorite topic of legislation. A reciprocation of mutual aid is the necessary consequence. A league of interest is thus formed, strengthened and cemented by the most mercenary motives; and the inmates of the temple of legislation are thus converted into vile 'money changers.' [Ib. p 3.]

"Like the leprosy, the monopoly system, from a single spot, has increased and spread itself over the whole body politic. There are now in operation in this State, one hundred banks, including two branches, with which no citizen, or association of citizens, is allowed by our laws to compete. [Ib. p. 6.]

"The system of joint-stock banking, by private associations, has been successfully conducted in Scotland, on a scale regulated alone by competition, and by demand and supply, for more than one hundred years, without a single failure in the whole of that period up to the present time." [Ib. p. 13.]

Speaking of the evils of an inflated currency, the Committee propose, as one remedy for them, "subjecting the issue of such bank paper as is authorized by law, to full, free and open competition."

"On this second topic," say the committee, "which is the only one with which the committee are specially charged, they earnestly recommend the organization of a system of private banking associations, which shall be wholly unconnected with each other, so that they may freely compete among themselves, as well as with the existing bank corporations. [Ib. p. 18.]

"The committee have prepared a bill, combining in a detailed form, the foregoing suggestions, which their chairman will ask leave to introduce." [Ib. p. 20.]

An effort was made by Mr. Young, for the Senate to take up this bill on the 27th of March, but it failed by a vote of twenty to eight. It was occasionally before the Senate, in committee of the whole, during the month of April, and, as I understand, was fully discussed: but on the 5th of May, the Senate rejected it by a vote of fifteen to ten; and on the same day, rejected the bill from the Assembly, by a vote of sixteen to nine.

Thus the measure was defeated for the present, though it numbered among its real friends, many of the most intelligent and influential members of the Legislature, and was loudly and generally called for by the people.

Their voice was at last, not only heard, but regarded;—and the measure appeared before the Legislature of 1838, in a more imposing form. Gov. Marcy recommended it explicitly and earnestly, in his message of that year, to the Legislature.

Before I proceed, however, to the occurrences of 1838, let me call attention to the particular matter now in hand, viz., the intention of the Legislature in respect to creating *corporations*, to carry out this measure of general banking.

The report of the Committee of the Senate, clearly exhibits the views of that branch of the Legislature on this subject. Instead of increasing corporations, it is obvious that one of the leading motives, if not *the* leading one, of the friends of the measure in that House, was to curtail, restrain and regulate the banking corporations already existing, and prevent the creation of any more.

The Assembly had evidently framed both their bills in such form as, in their opinion, would not render them obnoxious to the charge, that they were bills to create corporations; and the Attorney-General, to whom they were referred, is obliged to resort to a close argument, particularly in respect to the bill introduced by Mr. Cutting, to prove that the associations which they authorized were in fact corporations, though not declared to be so by the bills. Instead of passing the bill, "to authorize associations for the purposes of banking," which, it appears, at last they preferred, of the two, the Assembly sent it to a special committee, amended it, so as to remove the grounds of the Attorney-General's objections, and passed it, under a report from their standing committee on two-thirds bills, that it was not one of that class. From these facts, the inference is irresistible, that the Assembly intended the very opposite of creating corporations to conduct the business of banking.

In this aspect, the measure was presented to the mind of Governor Marcy, when preparing his message for 1838; and he expresses his views on the whole subject. As his message will be frequently referred to in the course of the argument, I will here give all he says on the subject:

"While the Legislature has been engaged in giving to these institutions the attributes of permanency and usefulness, an increasing unfriendliness has been exhibited towards them principally on account of their exclusive privileges. Monopolies are undoubtedly

incompatible with the equality of civil rights, which it is the great object of a free government to secure to all its citizens. Although the banks of this State are not strictly monopolies, yet they possess privileges withheld from individuals, and in consequence thereof have hitherto shared, and will probably continue to share, in the odiousness with which monopolies are justly regarded. To obviate this objection, it is desirable to discontinue the present mode of granting charters, and to open the business of banking to a full and free competition, under such general restrictions and regulations as are necessary to insure to the public at large a sound currency. This can be done, either by passing a general banking law, or by an entire repeal of the restraining act. Doubts have been entertained as to the constitutional competency of the Legislature to pass a General Banking Law, conferring corporate powers. Without entering into the argument on this question, I will only say, that I am inclined to the opinion that the Legislature have the power to pass such a law; but the spirit of the Constitution requires that it should be passed as a two-thirds bill. It is proper that I should also say, that this opinion is entertained with much diffidence, and is not expressed without duly considering the respectful deference justly due to the high authority by which it is opposed. If, however, you should conclude that the constitution interposes an insurmountable obstacle to the passage of such an act, then it is suggested that you should regulate and limit, by a general law, partnerships which may be formed to conduct the business of banking, in such a manner as to secure to them the essential advantages now conferred by special charters, and subject them to such restrictions and regulations as the public good may require.

"In recommending to the last Legislature a repeal of the restraining law, I felt it to be my duty to urge them to retain that part of it which prohibits the issue of notes or other evidences of debt to be put in circulation as money. The objections I then entertained to an unqualified repeal still have great force with me. I fear the injurious consequences to our currency that would result from granting to individuals and associations the unrestrained license to issue paper, and put into common use as a circulating medium; but if this permission could be made to depend on an ample fund to be provided for the redemption of the paper which might be put in circulation—if the issues could be graduated by the amount of this fund; and if it could be certainly and immediately available whenever required for the purpose of redemptiom, the objections to an unqualified repeal of the restraining law would be removed." [Assembly Doc. 1838, No. 2, pp. 7, 8.]

Here is presented for the first, so far as I have observed, the valuable feature of our General Banking Law, which provides

a safe and ample fund to secure the currency which it authorizes. With this addition, the plan recommended by the Governor is the same, substantially, as the one adopted by the Assembly the year before.

The Senate this year originated no bill on the subject; but awaited the action of the other House. All they did, till a late day in the session, was to appoint a committee on this part of the Governor's message, which consisted of Mr. Young, Mr. Willes, and Mr. Lacy.

The Assembly took up the measure in earnest and with spirit. They appointed a committee of five, as early as the 6th of January, on so much of the Governor's message as related to the *restraining laws and a general banking law*, consisting of Mr. J. Miller, Mr. G. W. Patterson, Mr. Bostwick, Mr. Nellis and Mr. Wallace.*

Mr. Patterson, from this committee, reported on the 3d February, and presented a bill, "to authorize associations to carry on the business of banking." The committee disclaim an intention to discuss at large the subject of currency and banking, but give, in a brief report, filled with good sense, the principal reasons in favor of the bill. A few extracts will suffice:

"The system of banking, as at present established in this State, under the provisions of the safety fund law, is considered by many as a *monopoly*, and as such, has become odious to a large class of our fellow-citizens;" * * * * "it cannot be denied, that a privilege is enjoyed by the few, which the great body of the people do not, and, under the existing laws, cannot enjoy." "By throwing open the business of banking to all who will give the bill-holder the necessary security, the jealousies now existing, will, in a great measure, be overcome, and capitalists will seek invest-

* Mr. Jedediah Miller, of Schoharie; George W. Patterson, of Livingston; William F. Bostwick, of Madison; Jeremiah Nellis, of Montgomery and Hamilton; and James Wallace, of Rensselaer.

ment for their capital where it can be most profitably employed; and thus the business of banking will be rendered secure to the public, and the competition sufficient to afford to the borrower, all the accommodations he can reasonably desire."

"The committee are well aware of the objections urged by the Attorney-General against the constitutionality of a bill for a general banking law that was before the last House of Assembly; but the committee, without attempting to decide whether the opinion of the Attorney-General was well founded or otherwise, know that many eminent individuals of the legal profession are clearly of opinion that the bill above referred to was constitutional, and might have become a law with the assent of a majority of the Legislature; still in preparing a bill for the consideration of the House, the committee have studiously avoided every thing that would constitute associations to be formed under its provisions, *corporations*, and they therefore think the constitutional objection cannot, with any propriety, be raised." [Assembly Doc. 1838, No 122, p. 3.]

The Assembly took up this bill, in committee of the whole, on the 14th of February, and were engaged almost daily upon it until the 28th of that month, when, on motion of Mr. Ogden, the committee of the whole were discharged from the bill, and it was referred to a select committee of nine. That committee consisted of Mr. G. W. Patterson, Mr. Ogden, Mr. J. Miller, Mr. Barnard, Mr. Ruggles, Mr. Mann, Mr. Hurd, Mr. Culver and Mr. Hoard.*

*This was, in many respects, a remarkable committee. Mr. Patterson and Mr. Miller were on the committee who reported the bill. The other gentlemen were Mr. David B. Ogden, of the City of New York; Daniel D. Barnard, of the City of Albany; Samuel B. Ruggles, of the City of New York; Abijah Mann, jun., of Herkimer; Davis Hurd, of Niagara; Erastus D. Culver, of Washington; and Charles B. Hoard, of Jefferson.

Mr. PATTERSON, the Chairman, had already distinguished himself as a friend of the measure. He was in the Assembly the year before, as we have seen, and one of the Select Committee to whom was referred the bill of that year, with the opinion of the Attorney General thereon. He aided in stripping it of all corporate attributes. He read, and doubtless wrote, the sensible report of 1838, from which extracts have been given. A mechanic by trade, he is self-educated, and the builder of his own fortune. Although hardly yet, I should suppose, in middle age, he is the Speaker of the Assembly for the present year, and lately was selected from a body of four hundred of the most respectable citizens of this State to preside over their deliberations, in a convention, held at Ithaca, to promote the construction of the New York and Erie Railroad. He is a striking instance of the fostering influence of our institutions, in elevating to distinction and usefulness, natural talents and worth. It is to be hoped, that the public will continue to enjoy the benefit of his services.

DAVID B. OGDEN, who moved the appointment of this committee, and of course, by parliamentary etiquette, entitled to be its chairman, I venture to say from my knowledge of the generosity of his nature, though I know nothing of the fact, gave

A committee could scarcely have been formed, with the whole State to select from, better qualified and assorted for the duty assigned them.

On the 10th of March following, the committee reported, by

way, and requested that Mr. Patterson should fill that place. A note like this, were the time and occasion proper, could not even approach a just notice of the character of this truly distinguished gentleman.

He is well known, not only in this State, but the United States. He has for many years stood near, if not at the very head, of the Bar of this State, and in the very first rank of the Bar of the United States. His practice has been principally in the Supreme Court of the U. S., for several years, and he is the only member of our Bar, who attends regularly the sessions of that Court at Washington. His professional engagements have directed his attention particularly to constitutional questions, and he may justly be considered, the *constitutional lawyer* of this State. Of all the men in the State, who could have been selected, for the revision and construction of such a bill as our General Banking Law, none could have been found better qualified than Mr. Ogden. It was most fortunate, that we had his services that year in our Legislature. He approved of the Statute, and it has, consequently, the full sanction of his deliberate judgment.

Daniel D. Barnard. This gentleman is also well known in this State, by several forensic efforts, of great beauty and power, in our higher courts, and by numerous literary addresses and other classical publications, which display ripe scholarship, and a highly cultivated taste.

Mr. Barnard is also distinguished for his political services and papers. He was a Representative in Congress from this State some years since, and is also a Representative, in the present Congress, of the District, in which he resides. The Assembly of 1838 committed the important subject of the surplus revenue and public instruction to a select committee, of which he was chairman, and during the session, received from him a report, which was universally admired, and greatly added to the high reputation he already enjoyed, for correct scholarship, and liberal and enlightened views on the subject of education. He took an active part in all the debates in the Assembly, on the General Banking Law.

Samuel B. Ruggles. Few gentlemen, of Mr. Ruggles' age, have a higher reputation, or enjoy more fully the public confidence. His report on the financial resources of this State, made to the Assembly of 1838, as chairman of their committee of ways and means, has deservedly given him an enviable fame, in this Country and Europe. He is now one of our Canal Commissioners, and has charge of one of our most difficult and important public works. Though several years short of the full maturity of middle age, it was delightful to observe the general satisfaction which was expressed, on his appointment to his present office. That appointment was singularly honorable to him He supplied the place left vacant by the death of the Hon. Stephen Van Rensselaer. And this honor was not the humiliating and hard-earned reward of political management, but the spontaneous offering of a grateful community.

He was an ardent and persevering friend of the General Banking Law, and he and his friends have taken large pecuniary interests in several of the associations, but principally in the Bank of Commerce. His views of banking and finance, are admitted to be enlarged and sound, and to him the Public are greatly indebted, for the liberal and enlightened provisions of that Statute.

Mr. R. is, besides, a well educated and good lawyer. Though not distinguished as an advocate, he deservedly commanded a large practice while engaged in his profession. His professional opinions were always treated with great respect, and received their full share of confidence. This State has good right to expect valuable services from such an officer.

Abijah Mann, Junior. There is not, probably, a gentleman in this State more familiar with our legislation than Mr. Mann. He has been many years in the Assembly, and once, certainly, if not oftener, a Representative in Congress. He has enjoyed the confidence of his political friends for a long time, and received many evidences of their approbation.

their chairman, that they had gone through the bill, amended, and agreed to it. It was then committed to the committee of the whole, and restored to its former place in the order of business. Four days afterwards, the committee of the whole took it up, and were engaged nearly every day upon it until the third of April following, when they reported to the House, that they had gone through the bill, amended it, altered its title, to "An Act to authorize the business of banking," (the one it now bears,) and agreed to it. The House then took up the bill by sections, and adopted them separately, after amending two or three of them, and at last approved the whole bill, by a vote of seventy-nine to twenty-two, and ordered it engrossed for a third reading. On the fifth of April, it came from the committee on engrossed bills, and was passed by a vote of eighty-six to twenty-nine, and sent to the Senate.

As the Assembly of 1838, is admitted by all, to have possessed an unusual amount of talent and moral worth, and especially of juridical talent, it seems proper that this Court should know, what gentlemen, in that House, and particularly the profession, gave their sanction under oath to this bill. They were the following:

Edmund Raynsford,	*Albany*,	John Osgood,	*Cortland*,
Seth H. Pratt,	*Allegany*,	David Mathews,	do.
Samuel Russel,	do.	Cornelius Dubois,	*Dutchess*,
James Stoddard,	*Broome*,	Lewis F. Allen,	*Erie*,
Isaac S. Miller,	*Cayuga*,	Cyrenus Wilbur,	do.
Henry R. Filley,	do.	Asa Warren,	do.
Nathan G. Morgan,	do.	Gideon Hammond,	*Essex*,
Abner Lewis,	*Chautauque*,	Luther Bradish,	*Franklin*,
George A. French,	do.	John Head,	*Genesee*,
Thomas I. Allen,	do.	Andrew H. Green,	do.
Hiram White,	*Chemung*,	Thomas B. Cooke,	*Green*,
Henry Balcom,	*Chenango*,	Peter Hubbell,	do.
Justus Parce,	do.	Daniel Wardwell,	*Jefferson*,
William H. Toby,	*Columbia*,	Benj. D. Silliman,	*Kings*,
William A. Dean,	do.	Cornelius Bergen,	do.
Abraham Bain,	do.	Geo. W. Patterson,	*Livingston*,

William Scott,	*Livingston,*	Azariah Smith,	*Onondaga,*
Wm. F. Bostwick,	*Madison,*	Henry W. Taylor,	*Ontario,*
Onesimus Mead,	do.	Jonathan Buell,	do.
William Lord,	do.	David Hudson,	do.
John P. Patterson,	*Monroe,*	Hudson M'Farlan,	*Orange,*
Ezra Sheldon, jun.	do.	Goldsmith Denniston,	do.
Marcellus Weston,	*Montgomery & Hamilton,*	Stephen W. Fullerton,	do.
		Horatio Reed,	*Orleans,*
Abraham V. Putman,	do.	Arvin Rice,	*Oswego,*
Jeremiah Nellis,	do.	John M. Richardson,	do.
David B. Ogden,	*New York,*	John A. King,	*Queens,*
John I. Labagh,	do.	Hezekiah Hull,	*Rensselaer,*
Adoniram Chandler,	do.	Jacob A. Tenyck,	do.
Willis Hall,	do.	Israel Oakley,	*Richmond,*
Alfred Carhart,	do.	David Clark,	*Rockland,*
John B. Scoles,	do.	Calvin Wheeler,	*Saratoga,*
Garret H. Stryker,	do.	Walter Van Veghten,	do.
Evan Griffith,	do.	Silas H. Marsh,	*Schenctady,*
Heman W. Childs,	do.	Mitchell Sanford,	*Schoharie,*
Anson Willis,	do.	Nathan Wakeman,	*Seneca,*
Samuel B. Ruggles,	do.	John Coryell,	*Tioga,*
David Hurd,	*Niagara,*	Robert Swartwout,	*Tompkins,*
Peter B. Porter, jun.	do.	Benjamin R. Bevier,	*Ulster,*
Russell Fuller,	*Oneida,*	Esbon Blackman,	*Wayne,*
Fortune C. White,	do.	Nicholas Cruger,	*Westchester,*
Henry Hearsey,	do.	Francis Barretto,	do.
Phares Gould,	*Onondaga,*	Niles Benham,	*Yates.*
James R. Lawrence,	do.		

The Senate received this bill from the Assembly, on the 16th of April, and read it a first and second time.

Three days afterwards, viz., on the 9th of April, Mr. Young, from "the select committee, to which was referred that part of the Governor's message which relates to the *repeal of the restraining law, and the introduction of free competition in the business of banking*," made an elaborate report, which is principally occupied with a history of the fluctuations of trade in England and this Country, and a discussion of the elementary principles of currency.* A few quotations from it will answer the purposes of this argument.

*This report is written with great spirit and force; and exhibits extensive research, and a familiar acquaintance with the subjects treated; but the imagination of Senator

After referring to the report of the committee of the Senate, made the previous year, on the subject of a general system of private banking, and, adopting the opinions of that report, the committee say:

"The subject of free competition in banking has, for some time past, very much occupied the public mind." [Senate Doc. 1838, No. 68, p. 2.]

"Impressed by the current of the public will, the Governor has recommended to the Legislature, 'to discontinue the present mode of granting charters, and to open the business of banking to a full and free competition, under such general restrictions and regulations, as are necessary to ensure to the public at large, a sound currency.'" [Ib.]

In conclusion, they say:

"The security, responsibility, checks and restraints which ought to be imposed upon banking associations, are indicated in the report to which reference has been made, and need not be repeated." [Ib. p. 39.]

The Senate took up the bill, in committee of the whole, on the 16th of April, and again on the 17th, when it was reported to the Senate, with amendments. The Senate then proceeded to consider and determine several other amendments, offered by different Senators, all of which failed, except one offered by Senator Beckwith, which was to add a new section at the end of the bill, in substance the same as the present thirty-third section, except fixing the specie basis of circulation at *fifteen*, instead of *twelve and one-half* per cent., as it now is.

Thus amended, the bill was approved, and ordered to a third reading, by a vote of twenty-four to eight. It was read the third time the same day, and after being so read, Senator Powers offered a resolution, that it required a two-thirds vote to pass it. This resolution was decided in the negative, by a vote of seventeen to ten. The bill, when this vote was taken, was the

Young was, evidently, greatly excited on those subjects, when he wrote it. His views are certainly too extravagant and ultra for the practical wisdom of the present day.

same precisely, as the Law now is, except the difference mentioned in the amount of the specie basis; for the Assembly, as we shall soon see, adopted all the amendments of the Senate, except the new section respecting the specie basis, and finally agreed to that, modified as to the amount of the per cent., as it now stands.

Hence, the vote of the Senate, was the expression of the direct opinions of the Senators upon, not only the general question of the constitutionality of the Statute, but upon the question, whether the *associations* were *corporations*.

The Senators who thus gave their solemn opinions in favor of the constitutionality of this Law, were:

Frederick A. Talmadge,	1*st Dist.*	Laurens Hull,	6*th District,*
Gulian C. Verplanck,	*do.*	Chester Loomis,	7*th District,*
Henry A. Livingston,	2*d District,*	John Beardsley,	" "
David Spraker,	4*th do.*	Samuel L. Edwards,	" "
Samuel Young,	" "	John Maynard,	" "
Martin Lee,	" "	Isaac Lacy,	8*th District,*
Micah Sterling,	5*th* "	Samuel Works,	" "
Levi Beardsley,	6*th* "	William A. Moseley,	" "
Daniel S. Dickinson,	" "		

On the same day the Senate passed the bill by a vote of twenty to eight. All the Senators who expressed opinions in favor of the constitutionality of the bill, and that it was not a two-thirds bill, voted for it on its final passage, except Senator Young; and three of those, who were of opinion that it was a two-thirds bill; viz., Coe S. Downing, from the First District; John P. Jones, from the Second; and Edward P. Livingston, from the Third; voted for it on its final passage; as did also, Henry A. Van Dyck, from the Second District, who did not vote on the other question.

The bill was sent the same day, viz., the 17th of April, to the Asesmbly, who referred it and the amendments of the Senate, to

a special committee, of which Mr. Patterson was chairman, who the next day reported, and recommended, that the Assembly agree to all the amendments of the Senate, except the one respecting the specie basis; which was accordingly done. The Senate adhered to its amendment, and the Assembly insisted upon its resolution of non-concurrence. Each House then appointed a committee of conference, who agreed on the section as it now stands. Both Houses approved of the compromise, and the bill was sent to the Governor and approved by him the same day.

No Statute of this State, I presume, ever underwent a fuller discussion, or elicited more legislative and financial talent and research. The attention of the whole State was directed to the subject, from the Chief Magistrate to the humblest citizen. The Assembly went into committee of the whole on this bill TWENTY-SIX different times, and on nearly as many different days; and took upon it, and its different sections, FOURTEEN divisions, and the Senate EIGHT. The Governor approved of the bill, knowing it had been passed as a majority bill; for it had not the certificate required by statute to be attached to two-thirds bills. [1 R. S. 156, § 3.] Had his opinion been, that it was either an unconstitutional, or a two-thirds bill, it would have been his unquestionable duty, to withhold his approbation.

The origin, progress, and final passage of the bill, and especially, the Message of the Governor which recommended it, the reports of the committees of the Senate and Assembly, and the vote of the Senate relative to its being a two-thirds bill, all concur in furnishing *conclusive* evidence, that the Legislature did not intend, by it, to create *corporations*.

The fact has already been mentioned, that the Legislature of this State has never passed an act of incorporation, general or special, without giving the corporate body a *seal*. If there

was any doubt, about the intention of the Legislature in this instance, the omission, to give the associations seals, would solve that doubt. I have not felt at liberty to omit a reference to this circumstance, though I cannot but regard it as comparatively unimportant, when there are so many other decisive proofs of the intention of the Legislature.

The intention of the lawgivers being known, and I might add, admitted by the Counsel for the defendant, how can a court of justice, which expounds, but does not make the law, disregard that intention?

If it is done at all, it can only be on the ground, that the Legislature designed to evade the Constitution, and have passed a Statute in fraud of its provision. This, in other language, is saying, that the NINETY-SIX Senators and Members of the Assembly who voted for it, have disregarded their oaths. That, instead of supporting "the Constitution of the State of New York," as those oaths required, they have deliberately violated it. When we recall the names, characters and services of those gentlemen, the thought is revolting. No, the true and correct view of the subject is, that those distinguished public servants, and *honest* men, did not intend one thing and express another; but, that seeing the necessity of a change in our system of banking, determined to open it to our citizens generally, and permit them to prosecute it, if they chose, in the form of associations, which neither had corporate powers, nor would be subjected to corporate odium; yet under such regulations as would secure to the people a safe and convenient currency. These associations may be called, limited partnerships, joint stock companies, or whatever else any one chooses, so long as they are not corporations.

In discussing this branch of my subject, I would call the attention of the Court to the proposition, that the only safe evidence

of the intention of the sovereign power to create a corporation, is an explicit legislative enactment. If that is wanting, it is almost, if not quite certain, that the sovereign will is not, that a corporation shall exist; and probably in this country, the safest and best rule would be, that nothing but a clear and unequivocal legislative declaration shall constitute a corporation. But whether that is the preferable rule or not, at least, this is clear, that in the absence of such declaration, nothing but the strongest reasons and most unequivocal evidence, should be considered sufficient to authorize a judicial opinion in favor of a corporate existence.

Let the subject then, be viewed in what light it may, the conclusion appears to be the same; viz., that the associations authorized by this Statute are *not corporations*.

My second position is, that, admitting that the *associations* authorized by this Statute are *corporations*, still the Statute is constitutional.

Statute constitutional, though associations are corporations.

As the Act must be presumed to have been correctly passed, as will be hereafter, I trust, most satisfactorily shown; that is, by a majority of a quorum of each house, if the bill is a majority bill, and by "the assent of two-thirds of the members elected to each branch of the Legislature," if the bill is a two-thirds bill; the question arising under my second position is, whether the Legislature can pass a law by any vote, majority or two-thirds, authorizing the formation of an indefinite and unlimited number of bodies corporate, or in other words, whether the Legislature can now provide by a general law, for the incorporation of an unlimited number of voluntary associations, as it could, and did in many instances, before the adoption of the present Constitution.

It is admitted by all, that, previous to the adoption of the present Constitution, the Legislature had unquestionable authority to pass general laws of incorporation, and the power had been exercised in five prominent instances, viz.:

"An Act relative to the university," passed April 5, 1813, (2 R. Laws, 263,) which authorized the incorporation of an indefinite and unlimited number of colleges and academies.

"An Act to provide for the incorporation of religious societies," passed April 5, 1813, (3 R. S. 292,) which authorized the incorporation of a like number of religious societies.

"An Act to incorporate such persons as may associate for the purpose of procuring and erecting public libraries in this State;" passed April 1, 1796, (3 R. S. 288,) which authorized the incorporation of the like number of libraries.

"An Act to incorporate medical societies, for the purpose of regulating the practice of physic and surgery in this State," passed April 10, 1813, (3 R. S. 304,) which authorized the incorporation of a medical society in each of the counties in this State.

"An Act relative to incorporations for manufacturing purposes," passed March 22, 1811, which authorized the incorporation of an indefinite and unlimited number of voluntary associations for manufacturing purposes.

I will here repeat the clause in the Constitution, which it is contended has deprived the Legislature of the power to pass general laws of incorporation. It is in the following words:

"Sec. 9. The assent of two-thirds of the members elected to each branch of the Legislature, shall be requisite to every bill appropriating the public monies or property for local or private purposes, or creating, continuing, altering, or renewing, any body politic or corporate." [Const. Art. 7, § 9.]

The first proposition, for which I contend, on this branch of the discussion is, that this clause in the Constitution is not applicable to a general law, which authorizes *all* our citizens to unite in companies, and incorporate themselves to carry on any

business, or manufacture, which the Legislature may think can be more usefully and beneficially for the community, conducted in that way, than by individual effort; but on the contrary, was intended to apply to every separate act of incorporation, which the Legislature might thereafter pass, conferring privileges on a few, to the exclusion of the many; and thus restain and impede the granting of monopolies, which are exclusive privileges, and produce inequalities of rights; giving to a few citizens, advantages, which are refused to all others.

Two official opinions on this subject have been delivered by two successive Attorney-Generals of this State, viz., Messrs. Bronson and Beardsley, one on a call from the Senate, and the other on a call from the Assembly.

The acknowledged talents and respectability of these officers, entitle their opinion to great consideration.* When we reflect, however, that those officers have not the aid of arguments by Counsel, and are frequently obliged to give their opinions to the Legislature, without full time for examination and reflection, and in the midst of other pressing professional and official engagements, we can hardly expect from them, the matured and cautious judgment of a judicial decision. These private acts of incorporation are also often blended with the attachments, interests, and struggles of political partizanship, and that man is more than human, who can wholly guard against their influence, while surrounded by them, and enjoying honors and distinction, which are, to some extent, at least, the reward of partizan fidelity. One of these opinions were delivered in 1835, and the other in 1837; both, unfortunately, since the policy of creating incorporations, especially for banking purposes, had become in

*Mr. Justice Bronson here remarked that his opinion, alluded to, ought not to be regarded as an authority. It was formed without the benefit of argument by Counsel, and was worth no more than the reasons it contained, and he should be happy to hear them fully examined.

some measure, a beacon light, by which to rally and direct party zeal. We know the learned and upright Judge who now fills one of these seats, too well, to doubt, that he is not only willing, but happy to have recalled, on this occasion, any incident or influence, which may perchance have imperceptibly exposed him to error, when, as Attorney-General, he gave the opinion alluded to. Knowing our danger, we may escape, and that voice is friendly, which gives us warning.

Attorney General Bronson gave his opinion on the 6th of January, 1835, on the call of the Senate. [Senate Documents of 1835, No. 4.] After a pretty full discussion of the subject referred to him, which was a proposed amendment of the general act authorizing incorporations for manufacturing purposes, he arrives at several conclusions, of which the third is as follows:

"The Legislature cannot now provide by general laws for the incorporation of voluntary associations, but must act directly in every grant of corporate privileges; creating some one or more corporations in particular." [Ib. p. 13.]

Attorney-General Beardsley gave his opinion on the 18th of April, 1837, on the call of the Assembly. [Assembly Doc. of 1837, No. 303.] After a more limited discussion, than that of his predecessor, he states several conclusions on the subject referred to him, which was, the "Act to authorize associations for the purpose of banking," which the Assembly proposed to pass in 1837, and which I have mentioned in the former part of my argument, the third of which conclusions is in these words:

"That the bill is unconstitutional, as it assumes to authorize the creation of an indefinite and unlimited number of bodies corporate, and should it pass into a statute, and associations be formed under it, they would, for the purposes contemplated, be absolutely null and void." [Ib. p. 9.]

The resolution of the Assembly calling for this opinion was passed on the 13th of April, and the opinion was delivered on the 18th. A brief space for forming an opinion, fraught with

such a momentous result. A result, which strips the Legislature of our State of a power, exercised repeatedly from almost the commencement of our government, with the happiest and most beneficial effects.

Mr. Bronson, in the fore part of the same opinion, in which he states his conclusion against the power of the Legislature to "provide by general laws for the incorporation of voluntary associations," in answer to the first interrogatory from the Senate, states the following as his answer:

"FIRST The Attorney-General can see no substantial ground for doubt, that the Legislature may, by one act, create two or more corporations. The Constitution says nothing on that subject. It only prescribes the number of votes which shall be necessary to every bill creating a corporate body; leaving all other questions about the passing of such laws, as they stood before, to the discretion of the Legislature." [Ib. p. 4.]

In other words, an act may be passed, creating any given number of corporations, from one to one hundred thousand, provided each company is distinctly and directly incorporated by the act.

Both of these conclusions are formed on the same section of the Constitution. It seems impossible to reconcile these two constructions of it. What is there in the language, or spirit of the Constitution, which will prohibit the Legislature from passing a general law for the incorporation of an unlimited number of voluntary associations; that is, from incorporating as many companies as our citizens choose to form; and yet permit the Legislature by a law, to incoporate as many companies as our citizens choose to *apply* for. The only difference is, that in the one case, the Legislature anticipate the applications, and pass a general law to meet them; in the other, they wait till the applications are made, and then, by one law, incorporate them all. But I submit, that the mode of legislation proposed, is far less safe, than the one condemned. For a law containing ten, one

hundred, or any given number over one, of distinct incorporations, cannot so readily or conveniently, nor will be likely to be so thoroughly scrutinized, by the members of the Legislature, as a general law of incorporation, plainly designating the object of associating, and placing distinct landmarks, and strong barriers around the incoporations permitted.

In truth, the Constitution neither directs as to one or the other mode. It is silent upon both; and as Mr. Bronson says in his first conclusion:

"The Constitution says nothing on that subject. It only prescribes the number of votes which shall be necessary to every bill creating a corporate body, leaving all other questions about the passage of such laws, as they stood before, to the discretion of the Legislature."

This view of the Constitution has been taken also by every Legislature since its adoption, as appears by a joint rule of the two houses, which has been in force for years. It is in these words: "The same bill shall not create, renew, or continue more than one incorporation, nor contain any provisions in relation to altering more than one incorporation." [See Joint Rules.] And Mr. Bronson, after quoting this rule, adds: "This rule must have been adopted, on the ground, that the subject had not been regulated by the Constitution, but rested in the discretion of the Legislature." [p. 5.]

Mr. Beardsley also holds this language in his opinion. [p. 8.] Speaking of the Constitution, he says:

"In its strict terms, the clause is confined to bills which *assume* to *create* corporate bodies, and does not extend to one which authorizes their creation by the voluntary association of individuals." He adds: "But this, in the opinion of the Attorney-General, would be too narrow a construction of that instrument: it would disregard its spirit and object, and adhere, with rigid technicality, to the letter. As understood by the Attorney-General, it requires, that all corporations, thereafter to be formed by the Legislature, should receive the direct assent of two-thirds of the members, in the passage of bills, indicating and creating each particular institution. This is the spirit of the provision, and is consistent with the letter."

The Court will at once see, that Mr. Beardsley does not prove, but assumes, that the spirit of the Constitution is different from its language. He refers to nothing in the context; to no other parts of the Constitution; nor to cotemporaneous history, which are the usual sources of light in giving construction to doubtful clauses of a constitution; to nothing, to justify his assumption, that the spirit and object of the Constitution are different from its language. And yet, on such untenable ground, he gives it a construction, which deprives the Legislature of an otherwise unquestionable power; and that too, in direct violation of a well settled rule of construction, viz., that when the language of such an instrument is plain and intelligible, a court is not at liberty to depart from it.

Both of the gentlemen direct their efforts, far more to proving what the Constitution should be, than what it actually is. A perusal of their opinions will fully justify this remark. They appear to be deeply impressed with the idea, that the State is in great danger of receiving irreparable injury from the increase of corporations; and they seem to regard it as their duty, to find some constitutional mode of checking their multiplication.

Mr. Bronson says:

"It is impossible to read the clause, without perceiving, that the design of the Convention was to impose a check on the increase of corporations." (page 9.)

"When such grants are made with an exclusive reference to the interests of the applicants; and when, however laudable may be the object, they are multiplied beyond the public wants, a positive injury is done to the whole community."

"The subject must have been regarded in this light by the framers of the Constitution; and without wholly prohibiting future grants, they imposed such a check on the Legislature, as was deemed best calculated to secure the people against the unnecessary increase of corporate franchises." (page 10.)

The remedy Mr. Bronson proposes for the evil, is indicated by the following extract from his opinion:

"The construction, which more certainly than any other, will attain this end, is that, which requires the Legislature, in cases not

already provided for by law, to act *directly on* every question of this description; and which requires the assent of the members—not to a bill under which an indefinite number of corporations may spring into life—but to a bill, creating some one or more corporate bodies in particular. This construction, while it is not inconsistent with the letter of the Constitution, is best calculated to give full effect to the intention of the Convention, and secure the public against the unnecessary increase of corporate franchises." (pages 10, 11.)

Mr. Beardsley also says:

"The mischief which the Constitution designed to prevent, was the inordinate increase of private corporations." (page 8.) "The restraint is upon their undue multiplication." (page 11.)

The remedy which he indicates for this evil, is the same as that proposed by his predecessor. He says:

"The Constitution demands, that the legislative discretion and judgment shall be applied to every corporation, which must be created by bill. If the contemplated institution is approved by the requisite number of members, the bill should pass into a law. But the discretion and judgment which are thus invoked, and the exercise of which is thus enjoined, can, in no sense, be exerted in the creation of institutions which spring into existence at the bidding of individuals." (page 9.)

Who does not see; and I ask these gentlemen themselves, if now, when the incidents and associations of the moment have passed, if they do not see, that they were laboring under an undue apprehension of evil, in regard to the increase of corporations? The remedy, too, which they propose, all must see was entirely fallacious, as an obligatory constitutional restriction on the Legislature. For what legislature; who had deliberately resolved to authorize prospectively one hundred, or an unlimited number of corporations, to promote and favor a particular branch of trade or business; would refuse any number of separate *applications* for the same purpose? Besides, the history of the State for the last fifteen years, during which, the new Constitution has been in operation, shows, that while no evils, political or moral, have been experienced from the many corporations, formed under our general laws, we have suffered deep and abiding evil, from our legislation, in favor of private cor-

porations, and their subsequent action. The lobby of our legislative halls has become a by-word and a reproach. How have corporate rights been stealthily obtained from the Legislature? What acts of incorporation have savored of, and raised high through the State, the notes of alarm and indignation against undue influence, if not, disgusting corruption? It may certainly be said, not general acts of incorporation. Both the gentlemen appear to have supposed, that if the Legislature was deprived of the power to pass laws, which did not directly, and in terms, incorporate a specific company, or companies by name, and were thus obliged to look directly upon each corporation created, the evil they so greatly apprehended, would be checked. For they well concluded, both from the past history of our legislation, the operation of the joint rule before mentioned, and the fitness of things; that it was highly improbable, that our Legislature would directly incorporate, by one law, more than one specific corporation, and thus, they were led, the one to propose, and the other to approve, an entirely new idea, which was; that by no vote, either majority or two-thirds, could the Legislature pass any bill of incorporation, which did not, in the language of Mr. Bronson, "create some one or more corporate bodies in particular," by direct legislative action on the question—and in the language, substantially, of Mr. Beardsley, which did not receive the direct assent of two-thirds of the members elected to each branch of the Legislature, and indicate and create a particular institution. The history of our legislation and of the adoption of the Constitution shows, that this, in the broad form presented, was fresh ground. While it is not the usual mode of creating corporations, by a separate and distinct bill for each act of incorporation, inasmuch as it permits any given number of corporations in particular to be created by one bill; so, neither is it, the other mode, by general act. Yet, as it were, by a side wind, it takes from the Legislature the well known and understood power of enacting general laws of incorporation in the ordinary form. I hazard nothing in saying, that the Convention which adopted the constitutional provision, never even approached its conception. What a new form our incorporating laws would assume, if it was carried into practice? How the Convention would have been startled; and with what surprise would our

Kents, Spencers and others, who were members, been struck; had the new legislative offspring, to which they were unconsciously giving existence, appeared in the full stature, in which it is proposed to us: and if informed, that while yet in youth, some years short of majority, it would control our Legislature, restrain its action, strip it of a beneficial power, they would have strangled it past hope. It descends to, and rests on the forms of the bills which the Legislature are to pass, and drives us to the inquiry, whether the Convention intended to place their restriction, solely, on so slight and changeable a basis. The mere statement of the inquiry furnishes the answer. It may be said, that a bill which creates at once, and without further action, one, or any given number of corporations in particular, is no more in substance, a bill creating bodies corporate; than a bill which authorizes, regulates the manner, and designates the object of an unlimited number of corporations. They are both in one sense, bills creating bodies corporate, but by different modes of legislation. One accomplishes the object in one way; and the other in another. In either case, the corporations may be said to be created by bill. And the legislative action is substantially, as direct in one case as the other—for there is no efficient action in either case, except in passing the bill. The true difference is—that in one case, the corporation is created at once, and the only act remaining to be done, is acceptance by the corporators—in the other, the corporators are to perform certain acts prescribed by the Statute. There is more or less action by individuals in each case. And the Convention embraced and acted upon two ideas, fairly indicated by its language, viz., 1st, full and direct creation at once by bill; and 2d, separate enactment—which two ideas are the distinguishing features of the mode of corporate legislation, intended to be prohibited as will hereafter be more fully illustrated.

And the question recurs, what does the clause in the Constitution prohibit? Does it prohibit the passage of general laws of incorporation, or not? Before discussing the question on its merits, let us settle the matter of authority upon the one side, as well as the other.

Directly opposed to the opinions of Messrs. Bronson and Beardsley,

is the unanimous opinion of the revisors of our Statutes—Messrs. Jno. Duer, B. F. Butler, and John C. Spencer. They were clearly and unequivocally of opinion, that this clause of the Constitution did not apply to a general law authorizing the creation of corporations; and that the Legislature had the same power to pass such laws after the adoption of the present Constitution as they had before. In their revision, they proposed to revise and amend all the five general laws of incorporations before referred to. [See Revisors Reports, chapter 15, of the first part, Title 1. Articles, 2, 3. of colleges. Articles, 4, 5. of academies. Report of chapter 18, of the first part, Title 1. of religious corporations. Title 2. of the incorporation of library societies. Title 3. of medical societies, and Title 4. of manufacturing corporations.] They also proposed an entirely new general law of incorporation, authorizing an indefinite and unlimited number of corporations of "Obituary Societies." [Revisors Report, chapter 18, of the first part, Title 6.]

Mr. Bronson, in his opinion, states, in reference to the opinion of the revisors, that he "is aware, that there is high authority for a contrary opinion" to his own. The Legislature also which enacted our Revised Statutes, concurred in opinion with the revisors, and approved and enacted their revision of the general law authorizing the incorporation of academies. [2 Rev. Laws, 263. Revisors' Reports, chap. 15, Title, 1, Articles, 4, 5. 1, R. S. 461.] And a subsequent Legislature has materially altered and amended the same act by a majority vote, as the Journals will show. [Laws of 1835, ch. 34.]

It will be remembered, that the prohibition in the Constitution, whatever it is, extends to every law, "continuing, altering, or renewing, any body politic or corporate," as well as creating it. The revisors, consistent throughout, were of opinion, that this clause in the Constitution did not apply to amendments and alterations of our general laws of incorporation, any more than to the enactment of other laws like them; and so Mr. Bronson, in his opinion, says. This is his language:

"From these reports it will be seen, that the revisors, who were gentlemen of high standing in the legal profession, entertained n

doubt upon two points; first, that the existing general laws, for creating corporate bodies, were still in force; secondly, that they might be revised and amended in the same manner as other public statutes." [page 7.]

Mr. Bronson, however, stated the following as one of his conclusions:

"Fourth. The existing laws for the incorporation of voluntary associations, may be amended; but not in such a manner as to authorize associations which are not now provided for by law." [p. 13.]

This opinion is formed on the constitutional clause we are considering, and I would respectfully inquire, how it can be held to apply to a law, altering or amending a body politic or corporate in some particulars, and not to a law, amending or altering it, in other particulars.

The thirteenth section of the seventh article of the Constitution contains a provision; that all the acts of the Legislature of this State then in force, and such parts thereof as were repugnant to the Constitution, were abrogated. Yet in the opinion of all, Messrs. Bronson and Beardsley included, not only were our general laws of incorporation then in force, unaffected by the provision, but all corporations, formed under them since its adoption, were in like manner unaffected by it, and were legally and constitutionally incorporated. If the Legislature cannot pass general laws of incorporation; on what principle can those already passed be amended or altered? And if they cannot be altered, they are eternal; and we must be content to have laws that no earthly power can touch, improve, or modify.

We have also the opinion of the late Governor of this State, the Hon. Wm. L. Marcy, in opposition to the opinion of Messrs. Bronson and Beardsley. In his message of 1838, before quoted, he says:

"Doubts have been entertained as to the constitutional competency of the Legislature to pass a general banking law, conferring corporate powers. Without entering into the argument on this question, I will only say, that I am inclined to the opinion, that the Legislature have the power to pass such a law; but the spirit of the Constitution requires that it should be passed as a two-thirds bill."

He adds: "It is proper I should also say, that this opinion is entertained with much diffidence, and is not expressed without duly considering the respectful deference justly due to the high authority by which it is opposed."

To this may be added the deliberate opinions, after full discussion, of the distinguished members of the profession of law, who were in the Senate and Assembly in 1838; and the opinion of a great number of the soundest lawyers in this State, who have been consulted on this subject by the different associations which have been organized under this law; and many of whom have given high evidence of confidence in their own opinions, by investing their funds in those associations.*

When we consider the high general professional attainments of the revisors of our laws, and their peculiar qualifications to give a sound and correct construction to our Constitution; the high judicial reputation of our late Governor, and his unquestioned qualifications to judge correctly upon the true construction of the Constitution; the high professional reputation of a large number of eminent lawyers who voted for this Statute in the Senate and Assembly, and of those who have given their opinions to the associations, and vested their funds in them; it may be said, without any impeachment of the acknowledged and high professional acquirements of

* I will mention two prominent instances. CHANCELLOR KENT, and GEORGE GRIFFIN, Esquire; both of whom are liberal subscribers to the Bank of Commerce, and the former, a large subscriber. The labors and reputation of Chancellor Kent belong to the country; and nothing, which I can say, will enhance the value of the former, or add to the latter. It is sufficient to mention his name, to inspire all the confidence that human worth commands. I may be allowed, however, to remark, that although he has now entered upon his seventy-seventh year, his faculties of mind and body appear to be unimpaired, his step is yet elastic, and his mind active. Since his retirement from the office of Chancellor, in consequence of having arrived at the age limited by the Constitution, which, if my memory serves me, was on the 30th of July, 1823, he has written his Commentaries, which have already passed through three editions, each of which he has enlarged, improved and corrected himself. He has also done a very large amount of professional business at his chambers, in giving and writing opinions, preparing written arguments, and drafting special conveyances; and although his charges are always very reasonable, he has thus made a liberal provision for his family; and still unimpaired, by such a long and steady course of useful and honorable employments thus happily ended, now waits his hour with cheerful serenity.

GEORGE GRIFFIN, Esq. This gentleman is also well known to the profession. He is in its very first rank—and when age, length of active practice, ripened experience, natural talent, the powers of the wary and watchful advocate, and the importance and extent of professional engagements are considered, perhaps I should say, at the head of the practicing Bar of this State, especially at Nisi Prius.

Messrs. Bronson and Beardsley, that the unanimous and concurring opinions of the three revisors, (supported as they are by the opinions of others,) upon all the propositions we have just been discussing, should rather command our assent, than the opinions of those two gentlemen which we have been considering.

Tested, therefore, by the weight of authority, it must be determined, that the Constitution does not apply to general laws, creating, or authorizing the creation of corporations; and that our Legislature may now, as they could before its adoption, pass such laws.

One reflection here occurs. By holding the construction of the Constitution for which we contend, the course of legislation is clear, wholesome and safe. By taking the other; we meet with difficulties; are involved in counter currents, if not inconsistencies; legislation is driven into devious courses; doubts are cast upon private rights; and honest industry alarmed and checked.

Let us now direct our attention to the determination of the true construction of the clause of the Constitution under discussion.

The first, most usual, and natural mode, is to look into the previous and cotemporaneous history of the State, and ascertain the evils which this constitutional provision was intended to guard against for the future. In an uncompromising search for truth, the fact cannot be disguised, that the circumstances attending and consequent upon the incorporation of the Bank of America, on the 2d June, 1812, gave rise principally, if not wholly, to this clause of the Constitution.* The prorogation of the Legislature by the Governor of this State, for the avowed object of preventing the incorporation of that bank by corrupt means; (the vote upon which showed a settled majority of one in its favor;) the subsequent indictment, for bribing, or attempting to bribe members of the Legislature; and the public trial of two gentlemen, who had theretofore

*The charter of that bank has since its incorporation been materially amended, its capital reduced, and it is now under the management of our most respectable citizens, none of whom, it is believed, were actively concerned in procuring its charter. It now stands among the first monied institutions of our State, and its officers receive and deserve the full confidence and respect of the community.

stood high in public estimation; been repeatedly honored with offices of high public trust, and both of whom were then in office, and discharging the duties of their respective stations; the alarm which was felt by the community, lest our institutions should fall a prey to a daring thirst of gain, which sought its gratification by corrupting the very fountain of our laws; were all yet held in vivid remembrance. And down to the very time, and during even the session of the Convention which framed our present State Constitution, the public press was the vehicle of charges, criminations and recriminations, against many of our public men, for their alleged agency in procuring the charter of that bank. And some of those gentlemen were members of that Convention. And it was probably owing to this circumstance, that the clause underwent so little discussion in the Convention as it did, and to the same circumstance, that Mr. King, the chairman of the committee who reported it, assigned his reasons for its adoption, in brief and general terms. [Debates of Conv. p. 446.] And doubtless to the fact, that some of the gentlemen, charged with delinquency in regard to the chartering of that bank, and many of their relatives and friends were still on the theatre of action in this State, is to be attributed, the guarded though still explicit language of Chief Justice Nelson, when speaking of the evil which this clause in the Constitution was intended to check, in his opinion, delivered in the case of *The People*, vs. *Morris*, [13 Wend. 336,] and to which I shall hereafter call particular attention.

That this section of the Constitution owed its origin to the cause mentioned, more evidently appears from the fact, that as first proposed and reported by Mr. King, it only required the assent of two-thirds of the members, "in both houses, to the passage of any act of *incorporation*." And it was afterwards amended in the Convention, by extending it to acts, "appropriating public monies for local purposes." [Debates of Convention, p. 446.] Chief Justice Nelson, who was a member of the Convention from Cortland county, has also added his authority in favor of my position in respect to the true origin of this constitutional provision. Speaking of the

time when the present Constitution was formed, and of the evil which it was intended to remedy, he says:

"But *private corporations* had multiplied to an extent that had attracted public attention, especially *banking institutions*. These had been sought for with zeal, and their enactment attended with circumstances that awakened public suspicion and alarm. So extreme had the evil become at one period of our history, that the Chief Magistrate of the State felt it his duty to exercise the power then existing in the Constitution, of proroguing the Legislature, and was triumphantly sustained by the people in the execution of this high and delicate trust. The fact affords strong evidence of the deep impression made upon the public mind as to these and *similar* private corporations, and of the scope and purpose of the clause on this subject. If we resort to the history of its introduction into the new Constitution, the above view will be confirmed. Mr. King, chairman of the committee of the Legislative department, reported the section; and when it came under consideration, said that the committee had looked upon the multiplicaiton of corporations as an evil; they had been created for a variety of purposes; they were exceptions to the common law; they could not be proceeded against in the ordinary way of prosecutions against individuals in courts of justice; they ought not to be increased, but should be diminished as far as could be done consistently with the preservation of vested rights. It is obvious, though the language used in the clause in question is general, that the honorable chairman had in his mind, (and he spoke for the committee,) the case of private corporations; that the great inducements to the adoption of the clause was a check upon them; and that the organization of communities, and the investing them with the privileges of mere muninicpal jurisdiction and authority, were not at all in contemplation." [*The People* vs. *Morris*, 13 Wend. 336, 337.]

It will be observed that the Chief Justice in speaking generally of the evils which the Constitution intended to remedy, remarks, "*Private incorporations* had multiplied to an extent that had attracted public attention, especially *banking institutions*." A recurrence, however, to the history of the times will satisfy him, that the idea of a repeal of the Restraining Act, or the passage of a general law of incorporation for banking purposes, was the farthest possible from the mind of the Convention. That no one at that day, even in his wildest dreams, thought of opening the busi-

ness of banking to all our citizens. The evil that pressed the Convention and the public was, the frequency of the enactment of separate acts of incorporation, each of which thronged our capitol, and legislative halls with their agents, who found their reward in obtaining exclusive privileges, principally for banking, which were withheld from our citizens generally. Opening at once, to a whole community, the business of banking, allowing all to bank who choose, is a very different measure, rests on entirely different principles of policy, and must be followed by entirely different results; from increasing from time to time, under a strong external pressure upon the Legislature, stimulated by individual interest, private and exclusive corporate privileges for banking. Nothing more clearly shows the difference between the two, than the history of the enactment of our present General Banking Law, and of the separate incorporation of the other banks of the State. Nor does any thing more satisfactorily prove the certainty of the overthrow of the banking monopolies of this State, and the suppression of their spirit, than the early, steady, active and persevering opposition of the holders of the exclusive charters, to the new general system.

The debates of the Convention, though very brief, general and unsatisfactory, also show that the evil aimed at was the multiplication of monopolies—partial and unequal laws—exclusive privileges, which benefit a few to the injury of the many. [Debates of Con. 446.]

As there never was any complaint against the corporations created under general laws; there would seem, therefore, to be no doubt, but that this provision in the Constitution was intended to remedy the evil of partial legislation, and to remove the temptations to corruption which such a course of legislation necessarily draws after it. The obvious and natural remedy was the one adopted, viz., not to allow the enactment of a law; either "appropriating the public monies or property for local or private purposes;" by which the few would be benefitted at the expense of the many; or "creating, continuing, altering, or renewing any body politic, or corporate," by

which privileges would be conferred on a few, to the exclusion of the many; by the vote of a bare majority; but that when either of those objects were sought through the agency of the Legislature, it should be so clear a case, that two to one should be in favor of it; and besides, if another case like the Bank of America should occur, in which the applicants for an exclusive privilege should be so reckless in regard to the means of effecting their object, as to use the criminal and subduing power of gold, they should be compelled to conquer two-thirds of all the members elected to each branch of the Legislature—a much more difficult, hazardous, and expensive enterprize, than drawing into their interest a bare majority of each House.

There was at that time, and still is, only two modes of Legislation known or understood for incorporating companies. One, by a general law, allowing all who choose, to take an act of incorporation for conducting a particular business or trade. The other, by a special act, incorporating a single and specific company.

Is it not then obvious to all, that this clause in the Constitution, so far as it relates to corporations, was intended to apply to that mode of corporate legislation, by which one act incorporated a single and separate company, and *not* to general laws, conferring the same privileges upon, and affecting all our citizens alike.

Although Governor Marcy's remark in his message of 1838, that the spirit of the Constitution required, that a general banking law should be passed as a two-thirds bill, was made, as he said, with much diffidence, his high political and judicial standing demands a notice of it. He appears to have made the remark, without recurring to the origin and cause of the constitutional provision; or to the two modes of corporate Legislation then in use. He makes the remark apparently under the general impression, that banking institutions are within the spirit of the clause, without reflecting upon the great difference between opening banking to all, and restricting it to a few; or that a general banking law, conferring corporate powers, is no more within the spirit of the Constitution, than a general manufacturing law; a general insurance law; a

general whale fishery law; or any other general law conferring like powers. If *one* general law, creating corporations for a particular purpose, is within the Constitution, than *every other* general law, conferring corporate rights for whatever purpose, is also within it. I cannot but persuade myself, that if the Governor had looked at the question in all its bearings and effects, he would have concurred with the revisors of our Statutes, in this particular, as he did in the more general proposition, that the Legislature had the same power now, as before the adoption of the Constitution, to pass general laws of incorporation; and that the restrictive clause was only applicable to private and exclusive legislation.

The language of the Constitution fairly and naturally indicates and covers this special legislation. It is:

"The assent of two-thirds of the members elected to each branch of the Legislature, shall be requisite to every bill appropriating the public monies or property for local or private purposes, or creating, continuing, altering or renewing, any body politic or corporate."

Does not the section, tested by its language, apply, and only apply to that mode of creating corporations, then in general use, by a separate act for each incorporation? The assent required shall be "to *every* bill," &c., "creating, &c., *any* body politic or corporate." The language indicates separateness and directness of legislation, and must be strained, to embrace general laws and indirect incorporation.

I do not mean to be understood as contending, that if a law incorporates more than a single company, it is not therefore embraced by the Constitution. I contend for the great and manifest distinction, between general and private legislation; between a law that confers the same privileges on all, and one, which confers privileges on a few to the exclusion of the many. It may be difficult to mark the exact line; but not more so, than to determine the old line between public and private acts; between internal improvements for general, and those for local benefit; and between bills appropriating public monies for local and private purposes, and those appropriating them for general purposes. There is a broad

distinction between them, founded on reason and principle. One is, and the other is not, within the evil provided against. One is, and the other is not, within the letter or spirit of the Constitution.

Neither Mr. Bronson, nor Mr. Beardsley claims, that the words of the Constitution naturally and freely apply to general acts of incorporation. All they contend for, in respect to the language, is, that it is not directly inconsistent with their construction of the clause. Mr. Bronson says:

"This construction, (that is, *his* construction,) while it is not inconsistent with the letter of the Constitution, is best calculated," &c., "Such laws, (that is general laws,) if not in direct conflict with the letter of the Constitution, would be plainly calculated," &c. [page 4.]

Mr. Beardsley says:

"In its strict terms, the clause is confined to bills which *assume* to *create* corporate bodies, and does not extend to one which authorizes their creation by the voluntary association of individuals. But this, in the opinion of the Attorney-General, (that is, *his* opinion,) would be too narrow a construction of that instrument."

And then, after stating it as his opinion, that the correct construction of the Constitution is to consider it applicable to laws authorizing the incorporation of voluntary associations, he says:

"This is the spirit of the provision and is consistent with the letter." [page 8.]

Governor Marcy also distinctly intimates his opinion, that a *general banking law* is not within the words of the restrictive clause. He remarks, however, yet with much diffidence, as we have seen, that "the *spirit* of the Constitution requires it should be passed as a two-thirds bill.

The framers of the Constitution were well aware of our general laws of incorporation, and of the frequency with which such laws were passed. Some of them were even alluded to in the few remarks that were made in convention on adopting the restrictive section. Had it been the intention of the Convention to include within this provision of the Constitution general laws of incorporation, would not other and appropriate language for that purpos

have been used? and especially, if the Convention had intended to prohibit altogether the passage of any more general laws of incorporation, either by a majority or two-thirds vote; (for let it be kept steadily in mind, that that is the position contended for by our opponents and sanctioned by the opinion of Messrs. Bronson and Beardsley,) would not other language have been used? would not another and a distinct section have been introduced into the Constitution? The manifest object of this section was to declare *by what vote*, certain laws thereafter should be passed, and not *what laws* should or should not be thereafter passed. Besides; if the Convention had supposed, that the effect of this section would be entirely to prohibit thereafter the passage of all general acts of incorporation, there would certainly have been opposition; the policy of the measure would at least have been doubted by many; a debate, and a full and protracted one, would have ensued. The public would have been alarmed by such a proposition, and the Press would doubtless have been heard. And had the Convention intended to prohibit the passage of general laws of incorporation for conducting the business of *banking*, or insurance, or any other trade or business; would there not have been in the Constitution an appropriate clause? or had the Convention intended to do anything except regulate the mode of legislation in respect to the vote to be given; would they have left their intention in doubt?

Seeing then, that the language of the section does not call for, but on the contrary, repels the construction claimed by the Counsel for the defendant; seeing also that it was not the intention of the framers of the Constitution to prohibit thereafter the enactment of general laws of incorporation; let me inquire briefly, if the light of experience should induce this tribunal, to extend this constitutional provision by construction, beyond the natural and fair purport of its language.

I think it far from rashness to assert, that if this section of the Constitution could be submitted now to the people of this State, it would be repealed almost unanimously.* Instead of promoting pu-

* Ch. Jus. Nelson remarked in this stage of the argument, that it was universally

rity in our legislation, or restraining exclusive and unequal grants of corporate privileges, it has the directly opposite tendency, by enabling a few members in each branch of the Legislature to control its action, and thus force through the forms of legislation, many measures, as unjust as they are unwise.

Mr. Beardsley, in his opinion, uses quite as strong language on this subject as could be expected from him in the position and relations he then stood. He says:

"The restraint imposed by the Constitution may be an unwise one, and unsuited to the present condition and wants of the community. It may have been imposed without adequate cause, and have proved to be illusory and mischievous. These are all possible. (page 9.)

I do not hesitate to add, that *they are all true;* and that such is the opinion of this community.

The report of the committee of the Senate made in 1837, and from which I have already given extracts for another purpose, holds the bold and direct language of truth on this subject; and shows the lamentable and humiliating influence which this provision of the Constitution has had in practice on our legislation.

The question then arises; is it the duty of this Court to extend this constitutional provision by construction; or is it rather their duty to restrict its influence? The answer is obvious.

There is a single other idea which ought to be stated in this connection; and that is, that there is no danger from any source, in permitting a legislature to legislate for the general benefit of the community; which must always be the case, with all general laws of incorporation. They create no distinctions; they confer no exclusive privileges; they benefit all alike. Such a power, surely, ought not to be taken from our Legislature, by implication or construction.

admitted, that the provision of the Constitution had entirely failed to effect the object intended. Instead of remedying, it had increased the evil.

Mr. JUSTICE BRONSON expressed his full concurrence in this remark of the Chief Justice; and added, that every one must be sensible of its truth, who had been familiar for some years past with our legislation.

This Court in the case of the *People* vs. *Morris*, (13 Wend. 325,) decided, under an opinion delivered by the Chief Justice, in respect to which it is bare justice to say, that it challenges an equality with any one contained in our Reports, that laws, both general and special, incorporating, or altering the acts of incorporation of our cities and villages, were not within the operation of this clause of the Constitution, and might be passed by majority votes; although the Court admitted that they were within its letter. The great principle, on which this decision rests, is that these corporations, being bodies politic, were created for the general benefit of the community, and were not within the evil intended to be remedied by this constitutional provison, and that it would be dangerous, and could not have been intended by the Convention, "to restrict the action of the Legislature in the municipal regulations of the State." The Chief Justice thus expresses himself:

"Are they within the evil this provision was designed to remedy? No one, I think, acquainted with the history of the times, or with the introduction of this clause into the Constitution, will venture upon this ground. It may be fortunate for truth, and what is deemed a sound exposition of this provision, that all who may desire to examine it, can recur to his own recollection, and challenge that of others upon this point. We think we hazard nothing in asserting, that the multiplication of cities or villages by the Legislature has at no time been a subject of complaint." (Ib. p. 336.)

How fully and forcibly this language covers the whole ground occupied by the present discussion. Who, acquainted with the history of the times, will venture to assert, that the passing of general acts of incorporation has at any time been the subject of complaint! As such acts were not within the evil intended to be remedied, they should be excluded from the operation of the constitutional restriction, even if within its words, on the principle of the decision just cited; *a fortiori*, they should be excluded, not being within its words.

This great principle has been acted upon in this state ever since the adoption of the present Constitution, in respect to bills "appropriating public monies or property for local or private purposes." Our legislation has been uniform in passing bills of this kind by the

ordinary majority vote, where the benefit was general, though the appropriation was confessedly local.

I conclude this branch of my argument by stating the answer to the question proposed, viz., that this constitutional provision is not applicable to general acts of incorporation, and that the legislature can pass a law by any vote, majority or two-thirds, authorizing the formation of an indefinite and unlimited number of bodies corporate; or in other words, that the Legislature can now provide by a general law for the incorporation of an unlimited number of voluntary associations, as it could and did in many instances before the adoption of the present Constitution.

But if the Court is not fully satisfied with this conclusion, and their minds are still in doubt, let me present one other rule of construction applicable to these great constitutional questions; a rule founded in the purest wisdom, and supported by the highest authority. It is, that no statute should be declared unconstitutional, unless it is *clearly and unquestionably* a violation of the Constitution.

This Court, in the case, *Ex Parte M'Collum*, (1 Cow. 564,) said, "Before the Court will deem it their duty to declare an act of the Legislature unconstitutional, a case must be presented in which there can be no rational doubt." And the Supreme Court of the United States, in the case of *Dartmouth College* vs. *Woodward*, (4 Wheat. R. 625,) held, "That in no doubtful case would it pronounce a legislative act to be contrary to the Constitution."

If then the argument, which has been presented, has failed to produce conviction, and only brought the Court into doubt, as to the constitutionality of the Statute, that doubt must be resolved in favor of its validity; and thus protect the immense amount of property invested under its sanction, and secure to the community the great benfits which have and must flow from its enactment.

Statute is constitutionally passed.

My third and last position is, that admitting that the constitutional restriction is applicable to general acts of incorporation; then I insist, that such a law may be passed by a two-thirds vote, and that this Law will be presumed to have been so passed.

One of the propositions stated, and I trust satisfactorily proved, in the course of the argument in support of my second position, is, that the constitutional provision was only intended to prescribe the *vote* by which each act should be passed, which appropriated public monies to local or private purposes, or created, or altered any body politic or corporate, and left every thing else to the discretion of the Legislature. This manifestly appears from the section itself, and might probably have been safely assumed without any argument. The only question then remaining is; whether this Court is not bound to presume, that this as well as every other act of the Legislature, which has passed through the office of the Secretary of State to the State Printer, and been published according to law, has not been constitutionally passed; or in other words, whether this Court can inquire beyond the certificate of the Secretary of State, and institute an investigation respecting the manner in which any given law has passed the Legislature.

I hold with confidence the negative of this proposition.

Our Statutes declare:

"§ 10. He, (the State Printer,) shall print, in volumes of octavo size, so many copies of the laws of each session, with the concurrent resolutions and indexes that shall be delivered to him for that purpose, by the Secretary of State, as shall be annually directed by the Secretary, who shall also revise and correct the proof sheets.

"§ 12. All laws passed by the legislature, may be read in evidence from the volumes printed by the State Printer, in all courts of justice in this State, and in all proceedings before any officer, body, or board, in which it shall be thought necessary to refer thereto. [1 R. S. p. 184.]

"§ 10. The Secretary of State shall receive every bill which shall have passed the Senate and Assembly, and have been approved and signed by the Governor, or which shall have become a law notwithstanding the objections of the Governor, or which, not having been

returned by the Governor within ten days, shall have become a law; and shall deposit such laws in his office.

"§ 11. He shall certify and endorse upon every such bill, the day, month and year, when the same so became a law, and such certificate shall be conclusive evidence of the facts therein declared." [Ibd. p. 157.]

"§ 3. No bill shall be deemed to have been passed by the assent of two-thirds of the members elected to each house, unless so certified by the presiding officer of each house." [Ibd. p. 156.]

It has been supposed by some, that two-thirds bills must have the certificate provided in this last section attached to them, or they are not valid. This has never been the practical construction put upon the section, as such certificates have not been published to my knowledge with the two-thirds acts, which they would have been, if they were considered essential to the validity of those acts. The object of the certificate would appear to be that, for which it has heretofore been used, to apprise the Governor how the act has been passed, that he may understandingly exercise his power of veto. For if in his opinion, a two-thirds bill has been passed by a majority vote, it is undoubtedly his duty to withhold his approval.

Other sections of the Statute appear to indicate this, as the object of the certificate.

The fourth section is in these words:

"§ 4. Every bill thus passed and certified, must, before it becomes a law, be presented to the Governor; if he approves, he must sign it; and he shall endorse thereon a certificate of his approbation, and deliver the same so endorsed to the Secretary of State." [1 R. S. p. 157.]

By this section, when the Governor approves a bill, he must endorse on it a certificate of his approbation, and deliver it to the Secretary of State. His certificate, it would appear, is the evidence on which the Secretary of State is to make his certificate, as directed by the eleventh section above quoted.

If the Governor does not approve a bill, and it is afterwards passed by two-thirds of the members present in each House, the presiding officer of each House must certify the vote thereof, on the bill, and

the presiding officer of the House which last passes it, must deliver the bill so certified to the Secretary of State. [See sections 5, 6, 7. 1 R. S. p. 157]

These certificates, appear to be the only authentication in such a case, on which the Secretary of State acts in indorsing his certificate.

If we give to the certificates, which the third section requires upon two-thirds bills, the same force and effect which are given to the certificates required upon bills disapproved by the Governor and afterwards passed by two-thirds present, they *then*, are no more than authentications upon which the Secretary of State acts when he endorses his final certificate; and certainly they can be entitled to no greater force, nor furnish any higher evidence of legislative action. At all events, they are acts anterior to the act of the Secretary of State, which, the Statute declares, shall be *conclusive* of the month and year when the bill becomes a law.

Does not this necessarily shut out all inquiry beyond the certificate of the Secretary of State?—And ought it not to do so? The consequences of permitting an investigation before a jury, of the circumstances under which a law was passed, for the purpose of ascertaining whether it had been constitutionally passed; or in other words, whether the members of the Legislature had kept their oaths of office, and regarded the Constitution, would seem to be dangerous, and certainly would, in many cases, be unjust, and might be fatal to the public peace.

The Constitution declares, that, "A majority of each House shall constitute a quorum to do business. (Const. § 3, 1 R. S. 43.) The presence, therefore, of a majority is essential to the transaction of any business, and especially to pass a law. This constitutional requirement is just as explicit and binding, as the one which requires the assent of two-thirds of the members elected to each house, to a two-thirds bill. If our Courts of law may inquire, by a jury, how a two-thirds bill was passed, in the like manner, they may inquire how a majority bill was passed. And thus statutes, which may

have been rules of action for years, and under which large amounts of property have been vested, and numerous titles taken, may be in effect abrogated by a court and jury, and declared void. Can a principle with such a consequence, be tolerated? The mere statement of it, produces its condemnation.

If there is no reason for it to rest upon; much less is there any authority. I presume such an extraordinary investigation has never been witnessed in any country, where the distinction is recognized between statute and common, or written and unwritten law.

Besides: Every Bill after being endorsed by the Secretary of State, as required by the Statute, is filed in his office and becomes a *record*. A record imports verity, and can only be tested by itself. As a general rule, no inquiry in pais is permitted, which may destroy it. It stands or falls by itself. This rule, so just and reasonable, should secure us from exposure to the hazard of losing the protection of statutes, we have lived under for years.

This point, it is true, does not directly arise on these pleadings, but a full discussion of the subject required its consideration.

We trust this Court is satisfied of the truth and soundness of the three propositions which I have attempted to prove, viz.,

First: That the *associations* authorized by our General Banking Law are not *corporations*.

Second: That if they are, the Legislature had power to pass the Law in the ordinary way, by a majority vote; and

Third: That if the Law required a two-thirds vote to pass it, such vote will be presumed to have been given.

In conclusion, the Court will permit me to express an earnest wish, that they will find it consistent with their duty, to announce their decision at an early day; and with permission I will mention one other fact, which I have been requested to state,* to induce the

* Isaac Carrow, Esq., of the City of New York, was present at the argument and made this request. He is largely interested in the Bank of Commerce, and next to

Court to adopt that course. It is, that the Bank of Commerce have called in one million of its capital on the first of October next, a very large portion of which, is to be paid by foreign shareholders. And I will add, on my own responsibility, that it must be a source of deep unhappiness to the high minded Directors of that bank, to see large sums coming from Europe on the credit of their names, for investment in the institution which they conduct, while a question like this is pending.

The country, and especially the mercantile community, have been agitated and afflicted for so many years, by sudden and unexpected events connected with the enactment and execution of our laws, that their pursuits have become a burthen, and their spirits faint. They long for quietness and peace; and I can render them and my clients no greater service, than to entreat this Court to give them rest.

SAMUEL WARD, Esq., the President of it, took, as I understand, the most active agency in organizing it. These gentlemen are well known in this country and in Europe, as standing at the very head of the mercantile and financial interests of the United States; and how deeply mortifying it would be, to have them, and others like them, placed in a position, where they would be obliged to confess to their European correspondents, that no reliance could be placed on our institutions and laws.

APPENDIX.

THE present seems not an unfit occasion, to take a brief view of the powers possessed by, and of the restraints imposed upon, the associations authorized by the General Banking Law.

Their means and mode of action have been fully considered in the preceding argument, and although not corporations, it is obvious, they are fully competent to conduct the most extensive banking operations, with as great benefit to, and as little personal liability from the shareholders, as our incorporated banks. But unless my views of the Act are entirely erroneous, they will prove decidedly more advantageous, both to the public and the shareholders, than the incorporated banks.

The Legislature has placed them on the broad principles of free trade. They have unrestricted powers to bank, loan monies, and deal in personal securities, in all ways permitted by the general laws of the State.

FIRST: "By discounting bills, notes, and *other evidences of debt.*" This authorizes the associations not only to discount in the ordinary way, but to discount any chose in action; as a bond and mortgage; a simple bond; an agreement for the payment of money; an account stated; in a word, any legal engagement to pay money; or evidence of debt. All of which may be safely discounted, by receiving assignments of them when the discounts are made.

SECOND: By "receiving deposits." The power on this subject being general, it, of course, includes the right to agree on the terms upon which deposits shall be received; with or without interest, with or without security, or in any other manner, or on any other legal condition the parties may think proper to make.

THIRD: By "buying and selling gold and silver bullion, foreign coins and bills of exchange." These are ordinary banking operations and need no comment.

FOURTH: By "loaning money on real or personal security." This is a broad power, and the same which is possessed by all the citizens of this State, and is not possessed, at least to the same extent, by the incorporated banks. It enables the associations to transact all the business usually transacted by trust companies, and even farther, to lend on an hypothecation of choses in action and goods and chattels.

This is a valuable power, and one which may be exercised with great benefit to the public, as it enables the associations, if they see fit to do so, to advance on any kind of property, real or personal. This would be a dangerous power, if belonging to corporations, and exclusive; but as it may be exercised by the whole community, in the form of these associations, it is harmless. It is only unrestricted trade.

But, FIFTH: All these things may be done, "in the manner specified in their articles of association;" "and by exercising such incidental powers as shall be necessary to carry on such business." This is free indeed. The *manner* may be agreed on in their articles of association: that is, the manner of doing all these *kinds* of business. It may hence, I think, be done by a board of directors; by a president and cashier, or by one; by branches or agencies, one, or more. In fine, in *any manner*, the interest or fancy of the parties may devise.

The associations may also exercise all powers incident to these various kinds of business. This leaves nothing unpossessed. The

associations are untrammeled, as they ought to be, except by the general laws of the State. And one of the greatest benefits which the State may expect from them, arises from their liberty to deal in public stocks, which the incorporated banks have not. The Bank of Commerce has already done the State good service in this respect, and like services may be expected from the other institutions, when their arrangements for business shall have been completed. This too, will be found to be a source of great profit to the new institutions, which is entirely denied to the chartered banks; and will prove of immense advantage to the other States in the Union, as it will give them a market for their stocks.

All these advantages cannot be expected from the Law, until every question respecting its validity shall have been finally settled; active opposition from opposing interests ceased; and public confidence shall flow in a full and warm current upon the associations.

The people, however, after all, are the greatest gainers by the new system. They have a convenient and perfectly safe currency; and also free competition among lenders—the two great ends of banking, so far as the public at large is concerned.

The associations, will, moreover, be stable. They are out of the reach of the fluctuations of popular legislation. Every association is a contract between the parties, which is protected by the Constitution of the United States, which prohibits a state from passing a "law impairing the obligation of contracts." These associations, therefore, must continue for the periods fixed in their articles of association, and enjoy the powers given by the Statute. A repeal of the law will only prevent any more from being organized. Thus we have a system of banking permanently settled, and no man can count the many blessings it will be the means of conferring on this people.

ERRATA.

Page 24, line 6, from bottom, for incorporated read *un*incorporated.

— 44, — —, of second paragraph, the quotation ends with the word *association*.

— 50, — 13, from top, for are, read *were*.

— 72, — 15, from top, for opinion, read *opinions*.

The word *in*, on the last line of page 46, and the first two lines on page 47, to be marked as quoted.